Supreme Court, U.S.
FILED

03 261 AUG 8 2003

No. _____

In the Supreme Court of the United States

JEAN FAWCETT,

Petitioner,

v.

COLIN MCROBERTS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN J. CULLEN
Counsel of Record

MILES & STOCKBRIDGE P.C.
600 WASHINGTON AVENUE
TOWSON, MD 21204-3965
(410) 821-6565

JAMISON G. WHITE
Of Counsel

MILES & STOCKBRIDGE P.C.
10 LIGHT STREET
BALTIMORE, MD 21202-1487
(410) 727-6464

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in concluding that there was not a wrongful removal of Travis McRoberts under the Hague Convention:

(i) Despite the father having given an express undertaking to the Scottish court that the child would not be removed from Scotland;

(ii) Despite the removal having breached a statutory *ne exeat* veto under Scots law; and

(iii) Despite the Scottish court being seized of the case and itself exercising rights of custody in respect of the child?

2. Whether the Court of Appeals erred in refusing to dismiss the appeal as moot even though the child has been returned to the jurisdiction of Scotland?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Jean Fawcett, an individual citizen of the United Kingdom, currently residing in Ayr, Scotland. Ms. Fawcett has no corporate affiliations. Jean Fawcett was the Plaintiff in the District Court and the Appellee before the United States Court of Appeals for the Fourth Circuit.

Respondents

Respondents are Colin McRoberts and Tammy McRoberts. Mr. McRoberts is a United Kingdom citizen currently residing in Bedford, Virginia. Mrs. McRoberts is a United States citizen and also currently resides in Bedford, Virginia. Neither Respondent has any corporate affiliations. The McRoberts were the Defendants in the District Court and the Appellants before the United States Court of Appeals for the Fourth Circuit.

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Petitioner, Jean Fawcett ("Ms. Fawcett"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit issued in this proceeding on April 15, 2003.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals" or "Fourth Circuit") that gives rise to this petition is published at 326 F.3d 491 (4th Cir. April 15, 2003) (hereinafter "*Fawcett*" or "Opinion"). It is reprinted in the Appendix ("App.") at 6a. Two subsequent Orders, dated April 18, 2003 and May 6, 2003, amending the Opinion are also reprinted in the Appendix at 3a and 5a. The opinion of the United States District Court for the Western District of Virginia ("District Court") is published at 168 F. Supp. 2d 595 (W.D. Va. 2001) and is reprinted in the Appendix at 28a. The decision of the Court of Appeals denying the Petition for Rehearing and/or Petition for Rehearing *En Banc* is unreported and is reprinted in the Appendix at 1a.

STATEMENT OF JURISDICTION

On October 11, 2001, the District Court issued a Memorandum Opinion granting Ms. Fawcett's Petition for Return of Child filed pursuant to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention" or "the Treaty"). The McRoberts filed a timely Notice of Appeal to the Court of Appeals. On April 15, 2003, following oral argument, the Court of Appeals formally entered its Order reversing the decision of the District Court and remanding the matter to that court consistent with its Opinion; thereby leaving nothing for the District Court to do but enter an order that the Scottish court return the child back to the United States. Ms. Fawcett's timely Petition for Rehearing and/or Rehearing *En Banc* was denied by the Court of Appeals on May 12, 2003.

STATUTORY PROVISIONS

This case is governed by The Hague Convention on the Civil Aspects of International Child Abduction, *opened for signature* October 25, 1980, T.I.A.S. No. 11,670 *instrument of U.S. ratification deposited* April 29, 1988, S. Treaty Doc. No. 99-11, *reprinted in* 19 I.L.M. 1501 (1980); 51 Fed. Reg. 10,494 (1986).

Article 3 of the Convention provides:

The removal or the retention of a child is to be considered wrongful where:

(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

(b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Article 5 of the Convention provides:

For the purposes of this Convention:

(a) 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

(b) 'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

The implementing legislation is the International Child Abduction Remedies Act ("ICARA"), adopted in 1988 and codified in Title 42, United States Code, Sections 11601-11610.

Title 42, United States Code, Section 11601(b)(3) states:

(3) In enacting this chapter the Congress recognizes—

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

The Children (Scotland) Act 1995 ("1995 Act") defines "parental rights" as those enumerated rights that a parent has in order to enable him or her to fulfill his or her parental responsibilities in relation to the child:

(a) to have the child living with him or otherwise to regulate the child's residence;

(b) to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing;

(c) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative.

1995 Act, § 2(1).

The 1995 Act defines "parental responsibilities" as the following rights that a parent has in relation to her child:

(a) to safeguard and promote the child's health, development and welfare;

(b) to provide, in a manner appropriate to the stage of development of the child –

(i) direction;

(ii) guidance to the child;

(c) if the child is not living with the parent, to maintain personal relations and direct contact with the child on a regular basis; and

(d) to act as the child's legal representative, but only in so far as compliance with [the foregoing] is practicable and in the interests of the child.

1995 Act, § 1.

STATEMENT OF THE CASE

Ms. Fawcett and Mr. McRoberts litigated the custody of their children in the Ayr Sheriff Court over a number of years. When Ms. Fawcett feared that Mr. McRoberts was about to remove the parties' younger child, Travis Colin Patrick McRoberts ("Travis" or "the child"), from Scotland to the United States, she asked the Scottish court to intervene again and prevent him from doing so. The Scottish court then required that Mr. McRoberts give the court an express undertaking that he would absolutely not remove Travis from Scotland. He then fled Scotland almost immediately with the child and ultimately hid him in Virginia. Upon being advised that the child had been removed from the country, the Scottish court declared that such action had not only violated Ms. Fawcett's statutory parental rights but that Mr. McRoberts was in contempt of court, it fined him and ordered his arrest. The Court of Appeals erroneously held that Mr. McRoberts' behavior, actions, and contempt of the Scottish court were not wrongful because Ms. Fawcett did not have "rights of custody."

The scope of the term "rights of custody" in this case raises questions of exceptional importance. The Fourth Circuit's opinion erroneously concludes the Scottish court does not have "rights of custody" and that *ne exeat* orders; i.e., the right to veto the removal of a child from a jurisdiction, do not afford a parent or even the court that issues such an order with a "right of custody" within the meaning of the Convention. Such a position is in direct conflict with our own state court decisions on this very issue, one federal Court of Appeals and the overwhelming weight of

authority in countries around the world. The Fourth Circuit has also created a circuit split with the Eleventh Circuit on the issue of mootness under the Hague Convention. The Court of Appeals' decision will now disrupt the operation of the Convention and should not be allowed to carry such weight in the absence of Supreme Court review.

Ms. Fawcett and Mr. McRoberts were married on September 20, 1986 in Dalmellington, on the upper end of Scotland's Doon Valley. Travis was born in Scotland on January 3, 1994. (App. at 30a). His sister, Melody, was born on May 8, 1990. Scotland is now and has always been Travis' only habitual residence. The parties later divorced on November 20, 1998. (App. at 31a). The Decree of Divorce entered a "Residence Order" and ordered that Ms. Fawcett maintain contact with her children on extended weekends and for other significant periods (under a "Contact Order"). (App. at 31a). While Travis and Melody were required to have their residence listed with Mr. McRoberts, they were also required to have substantial contact with Ms. Fawcett for extended weekends, from Friday at 6:00 p.m. until Monday at 9:00 a.m. In addition, the Scottish court also ordered contact between the children and Ms. Fawcett for two weeks during the school summer holidays, one week during the October holidays, one week during the Easter holidays and one week at Christmas at times to be agreed between the parties. (App. at 31a). In other words, the children spent over 4 ½ months each year with their mother, an arrangement that would certainly be construed as joint custody in this country.

The months both preceding and following the divorce itself were litigious ones. For more than three years, the parties waged numerous legal battles before the local sheriff court seized with jurisdiction over how the children's time would be split between their parents. (App. at 32a). In February 2001, Mr. McRoberts and Ms. Fawcett were again

embroiled in another custody proceeding, including a motion for interim interdict to prevent Mr. McRoberts from removing the children from Scotland to the United States. (App. at 32a). On February 15, 2001, Mr. McRoberts, himself a police officer, gave an undertaking[1] to the Ayr Sheriff Court that he would never remove either Travis or his sister from Scotland to the United States. This undertaking was recorded in the Scottish court's Interlocutor. (App. at 32a).

At some time between his February 15, 2001 undertaking and March 29, 2001, Mr. McRoberts fled with Travis (but not with Melody) and brought him to the United States. (App. at 33a). The Scottish authorities discovered his flight when Mr. McRoberts failed to appear as he was required to do for a scheduled custody hearing on these matters. Thereafter, on March 29, 2001, the Sheriff Court in Ayr held that Mr. McRoberts had wrongfully removed Travis from that court's jurisdiction in breach of his express undertaking not to do so and had removed Travis from Scotland without Ms. Fawcett's express permission in violation of her parental rights under Sections 2(3) and 2(6) of the 1995 Act. The court further found Mr. McRoberts in contempt, fined him £2,000, and authorized his arrest. (App. at 33a).

In April 2001, Mr. McRoberts secretly moved to Bedford, Virginia with his current wife, Tammy, her son Tyler, and Travis. (App. at 34a). After arriving in Bedford, the McRoberts went to considerable lengths to conceal Travis not only from the Scottish courts and the American authorities, but also from any contact with Ms. Fawcett. (App. at 34a). After having fled Scotland in a furtive breach of his court-

[1] Undertakings are utilized principally by courts in the United Kingdom, Australia, and New Zealand. The concept of an undertaking is derived from the law of contracts. *See The Hague Convention and United States of America*, Annex B, Comment on Undertakings, United States Department of State (August 10, 1995). It is therefore akin to a consent order.

ordered undertaking (recorded in the Scottish court's own Interlocutor), Mr. McRoberts established a post office box in Pennsylvania. (App. at 34a). Evidently, Mr. McRoberts feared that the Scottish Sheriff Court or Ms. Fawcett would discover his and Travis' whereabouts. In a July 2001 letter to his daughter, Melody, Mr. McRoberts wrote, "We are really worried about what might happen if we give out our address, so I have arranged for a post-box for you to write us... This is not near where we live, but the letters will get to us." (App. at 34a).

After considerable difficulty and expense and with the assistance of the United States Central Authority and the National Center for Missing & Exploited Children, the McRoberts and Travis were located in Bedford, Virginia and Ms. Fawcett brought the instant action. (App. at 34a). Until the days following the District Court's Show Cause Order of September 26, 2001, Travis had had no contact whatsoever with his mother after he was removed from Scotland – with the exception of one letter he wrote some time in July. It read, "Dear Mum and Melady [sic], I Love I hope I see you agen [sic]. I have a faver [sic] can you find my big tank and my soldiers plese. [sic]" (App. at 34a).

On October 11, 2001, following the evidentiary hearing, the District Court concluded that Travis had been "unlawfully and wrongfully removed" from Scotland by Mr. McRoberts in breach of the court-ordered undertaking and in breach of Ms. Fawcett's distinct custody rights under Article 5 of the Convention and her own court-ordered parental rights and responsibilities. Travis was returned to Scotland forthwith.

The Court of Appeals reversed and remanded the District Court's decision, concluding: (1) that the appeal was not moot, notwithstanding the fact that Travis had already been returned to Scotland; (2) that Ms. Fawcett did not have

"rights of custody" over Travis within the meaning of the Convention; and (3) that the Scottish Sheriff Court was not actually exercising "rights of custody" over Travis within the meaning of the Convention at the time of his removal notwithstanding Mr. McRoberts' required undertaking and its recordation in the Interlocutor. (App. at 6a). The Court of Appeals held that the McRoberts' removal of Travis was not wrongful, thereby opening the door for them to pursue a further removal with impunity.

The Court of Appeals' Opinion has generated two (2) questions of exceptional importance requiring immediate redress. First, by ruling that the Sheriff Court did not possess "rights of custody" under the Convention despite its undisputed custody jurisdiction and Mr. McRoberts' own undisputed recorded undertaking, the Fourth Circuit is in direct conflict with the highest courts of two of our sister signatories on the exact same issue. Further, the Court of Appeals opined that *ne exeat* clauses do not confer "rights of custody" within the meaning of the Convention. The Fourth Circuit's position is in conflict with numerous United States State courts, one federal Court of Appeals and is so contrary to the overwhelming weight of case authority in other countries that are parties to the Convention to require immediate redress.

Second, the Opinion conflicts with the published decision in the Eleventh Circuit, *Bekier v. Bekier*, 248 F.3d 1051 (11th Cir. 2001) on the issue of mootness.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit Erred By Concluding That There Was Not a Breach of Custody Rights Within the Meaning Of The Convention When the Scottish Court Was Exercising Jurisdiction Over the Custody Matter and Had Issued An Order Prohibiting Mr. McRoberts From Removing Travis From Scotland.

The basic obligation under the Convention requires that a child (up to the age of 16) who is wrongfully removed from the country of habitual residence be returned to that country forthwith so that a court in that jurisdiction can determine the merits of the custody controversy. Such a wrongful removal or retention occurs when the removal is "in breach of rights of custody attributed to a person, *an institution or any other body,* either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal." Convention, art. 3(a) (emphasis added).

It has been accepted in all Contracting States where the issue has arisen that a court may be an 'institution or other body' to which custody rights are attributed. *See* Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on the Civil Aspects of International Child Abduction*, OUP, Oxford, 1999, at 66 *et seq*. This proposition having been accepted, it has frequently been considered precisely when a court can be said to hold rights of custody. It is well accepted that for this to happen the court must be seized of matters of custody within the meaning of the Convention. On this issue, the Fourth Circuit's opinion now stands in direct conflict not only with the plain language of the Treaty but with two of the highest courts of our sister signatories, Canada and England. Because the "opinions of our sister signatories [are] entitled to considerable weight," this Court may look to those courts for guidance. *See Air France v. Saks*, 470 U.S. 392, 404, 105 S.Ct. 1338, 84 L.Ed.2d 289 (1985).

The Fourth Circuit's opinion is in conflict with the Canadian Supreme Court case of *Thomson v. Thomson*, [1994] D.L.R. (4th) 253, a matter in which the Canadian court also had the opportunity to interpret the Convention in light of Scots law. In *Thomson*, the parties had always lived in Scotland and their son had been born there. Two months after the parties separated, the local Sheriff Court awarded the mother interim custody of the child and the father interim access. Based upon information that the mother had been contemplating removing the child to Canada, the Sheriff Court further ordered that the child remain in Scotland pending an additional court order. The mother then removed the child to Canada just days later. On appeal, the mother sought to challenge the trial court's determination that her removal of the child was wrongful under the Convention. In dismissing the mother's appeal, and upholding the lower court's conclusion that removal was wrongful, the Canadian Supreme Court held:

> It seems clear that the non-removal clause was inserted into the custody order of November 27, 1992 to preserve jurisdiction in the Scottish court to decide the issue of custody on its merits in a full hearing at a later date. Thus the Scottish court became 'an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention' having custody rights within the meaning of art. 3.

Id. ¶ 67-68.

Here, during the years following the parties' 1998 divorce, Travis was the subject of numerous custody proceedings before the Ayr Sheriff Court concerning his contact with his parents. It therefore defies logic to suggest that the Ayr Sheriff Court was anything but an "institution"

concerned with the "care of" Travis. Convention, art. 5. Moreover, as the body charged ultimately with determining Travis' place of residence, the Ayr Sheriff Court was clearly seized of jurisdiction over the matter, and under the Convention, possessed a right of custody over Travis.

As in *Thomson*, in Ms. Fawcett's case the Sheriff Court never divested itself of jurisdiction. Indeed the Scottish court, by virtue of its orders, accepted a sworn undertaking from Mr. McRoberts that he would not remove Travis from the United Kingdom and the court then subsequently recorded that undertaking in its Interlocutor. In other words, the Scottish court entered a consent order, but an order nonetheless.

In Scotland, a breach of an undertaking is no different from a breach of an express court order, best evidenced by the Sheriff court's own March 29, 2001 Order holding Mr. McRoberts in contempt, levying a £2,000 fine against him and authorizing his arrest. (App. at 34a). Clearly the Ayr Sheriff Court was exercising those very custody rights under the Convention as those exercised by the Scottish court in *Thomson*. The Fourth Circuit's conclusion that no wrongful removal occurred should therefore be reversed.

The Fourth Circuit considered the leading United Kingdom House of Lords case, *Re H. (A Minor) (Abduction: Rights of Custody)* [2000] 2 W.L.R. 337, [2000] 2 All E.R. 1, 1999 WL 1319095, and accepted its ruling. Then the Court of Appeals reached a conclusion that cannot sit with the House of Lords' opinion despite identical factual underpinnings. In *Re H.*, the mother gained interim custody of the child but with the condition that the child was not to be removed from Ireland without leave of the court. The father, who had been given interim rights of access, filed an application with the trial court requesting that he be made guardian of the child. Before the court could rule on his application, the mother fled to England with the child. The

House of Lords held that the trial court possessed "rights of custody in respect of H. at the time of her removal and that these rights were being exercised by reason of the pending application of her father to be appointed her guardian." *Id.* 1999 WL 1319095, at *8. Key to its holding, however, was the court's recognition that "the application to the court must raise matters of custody within the meaning of the Convention" in order for custody rights to vest in the court. *Id.* 1999 WL 1319095, at *7.

The Fourth Circuit erred in its application of this case in concluding that the Ayr Sheriff Court did not enjoy rights of custody at the time of Mr. McRoberts' flight from Scotland with Travis. The Fourth Circuit concluded that Ms. Fawcett's application to the Sheriff Court for a court order prohibiting Mr. McRoberts from leaving Scotland with Travis did not "raise matters of custody within the meaning of the Convention." (App. at 26a) (quoting *Re H.* 1999 WL 1319095, at *3). But at the time of removal, the Sheriff Court was not only clearly seized of jurisdiction over the entirety of the custody matter, but was also specifically seized of custody by virtue of Ms. Fawcett's application for an interdict that Travis not be removed from his habitual residence and Mr. McRoberts' court-ordered undertaking. An application that the child should remain in the jurisdiction clearly gives rise to a matter of custody within the meaning of the Convention. It is readily apparent from the judgment of the House of Lords in *Re H*, which the Fourth Circuit accepted, that the crucial issue with regard to whether a court is seized of matters of custody within the meaning of the Convention is whether the proceedings have a bearing on the determination of the child's residence. In accepting and recording Mr. McRoberts' undertaking that Travis would not be taken from Scotland, the Ayr Sheriff Court was making a ruling on the determination of the child's residence. The

Scottish court was preserving its own jurisdictional right to make custody decisions. The Fourth Circuit nevertheless ruled that the Ayr Sheriff Court was not seized of an application that raised matters of custody within the meaning of the Convention.[2] In reaching this conclusion, the Fourth Circuit clearly erred.

Because the Fourth Circuit's decision conflicts with leading sister signatory case law, it will lead to uncertainty in the understanding and operation of the Convention. For this reason alone, this Court should grant certiorari to redress the Fourth Circuit's error.

The issue of whether a court can exercise "custody rights" under the Convention is also intertwined with the broader issue of whether *ne exeat* orders; i.e., the right to veto a unilateral removal of a child from the established jurisdiction of a court, confer upon courts and those with parental rights a "right of custody" for Convention purposes. This is a

[2] The Fourth Circuit's opinion is also at odds with the English Court of Appeal in *B. v. B.* (Abduction: Custody Rights), [1993] 2 All E.R. 144. There, a consent order granting interim custody to the mother with liberal access to father was entered by the court. This interim order contained a clause preventing the child's removal from Ontario. In an affidavit to the court, the mother stated: "I have no intention of leaving the court's jurisdiction without an appropriate order of his honourable court." *Id.* At a subsequent hearing the court continued the interim custody of the mother and specified the access times of the father, but failed to include a non-removal clause. The mother left for England with the child the very next day. Based upon these facts, the English Court of Appeal found that the mother's actions were the "plainest example of an unlawful removal" under the Convention because the removal had breached the trial court's rights of custody; i.e., its right to determine the child's place of residence. *Id.* at 149. Reflecting on the breadth of the definition of "custody rights" under the Convention, the Court noted that the power to determine the child's place of residence being itself characterized as a right underlies the width that should be given to the word "rights" in the Convention. *Id.*

crucial issue now needing clarification in the United States because it is the subject of various conflicting interpretations in our own State and Federal courts, and is contrary to the plain language of the Treaty and numerous international courts.

The existence of "rights of custody" is key to the operation of the summary return mechanism on which the Convention is based. *See* Convention, arts. 3 & 12. The interpretation of "custody rights" in the context of the Convention must be undertaken in light of the objects and purposes of the Convention. *See* Restatement (Third) of Foreign Relations Law § 325 (1) (1987) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose."); *see also* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31.1, 1155 U.N.T.S. 331, 340.

In *Fawcett*, the Fourth Circuit adopted an erroneous approach to determine the meaning of "custody rights" within the context of the Convention. As a threshold matter, the text of Article 5 provides a partial, semi-autonomous definition as to what rights of custody may include. For purposes of the Convention "rights of custody" shall include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." It has been accepted that for Convention purposes it does not matter how rights are classified under the law of the child's state of habitual residence, the crucial issue being the nature of the rights that exist. *See Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000); *C. v. C.*, (Minor: Abduction: Rights of Custody), [1989] 2 All E.R. 465, 472-73. For this reason, it is clear that rights of custody have a semi-autonomous status under the Convention. *See* P. Beaumont & P. McEleavy, at 74; Linda Silberman, *Hague International Child Abduction*

Convention: A Progress Report, 57 Law & Contemp. Probs. 209, 259 (1994). Applying this reasoning, courts in Contracting States have from the very early stages in the operation of the Convention had to determine where the bottom line falls for custody rights for the purposes of the Convention. The importance of there being a bottom line is brought into focus because the Convention itself draws a clear distinction between rights of custody and rights of access; only breach of the former can trigger the operation of the summary return mechanism. Yet Article 5's emphasis on determining the child's place of residence has been completely distorted by the Fourth Circuit and equated only with the ability of an arbitrarily classified "custodial parent" to determine residence.

The correct understanding of Convention "custody rights" can be discerned by looking to the official report accompanying the Convention:

> This final Report must fulfill another purpose, viz. to supply those who have to apply the Convention with a detailed commentary on its provisions. Since the commentary is designed in principle to throw light upon the literal terms of these provisions, it will be concerned much less with tracing their origins than with stating their content accurately.

See Eliza Perez-Vera, Explanatory Report, *reprinted in* III Actes et Documents de la Quatorzieme Session, Child Abduction, 426, 427 (Permanent Bur. Of the Hague Conf. On Private Int'l Law 1982) (hereinafter "Perez-Vera Report").

The Perez-Vera Report goes to great lengths to outline the factual circumstances that create "custody rights" and places special emphasis on the inclusion of the "right to determine the child's place of residence." Perez-Vera Report, ¶ 84, at 452. In paragraph 71, the Perez-Vera Report underscores the point that "the intention [of the Convention] is to protect all

the ways in which custody of children can be exercised"; and urges, in paragraph 67, "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration." *Id.*

Moreover, the *travaux preparatoires* of the Convention are additional evidence that a *ne exeat* clause confers custody rights. Such *travaux* are compelling sources in interpreting international treaties. *See Air France v. Saks*, 470 U.S. 392 (1985). *See also* Restatement (Third) of Foreign Relations Law § 325 Reporter's Note 1 (1987).

What the minimum requirement should be for a person, institution or other body to have rights of custody was raised at the 14th Diplomatic Session of the Hague Conference at the time of the drafting of the 1980 Convention. *Id.* at 76. The intervenor on that occasion recognized that a person other than the primary carer might have a right to determine the child's place of residence. *See Procés-verbal* No. 4, at 271, *reprinted in* III Actes et Documents de la Quatorzieme Session, Child Abduction (1982). Such recognition already existed at that time in England whereby a parent, usually a father, might be accorded such a right following a divorce to ensure that the children could not be removed from the jurisdiction without his permission. In the time since the Convention has entered into force, the use of such orders has become increasingly popular in many States. In Scotland, a statutory rule to this effect is found in Section 2(3) of the 1995 Act. Such rules seek to guarantee that children are not unilaterally removed abroad (the very purpose of the Treaty), but if relocation is to take place, then all the parties concerned must consent, or in the absence of consent there must be a court order. Such rules ensure the primacy of the child's state of habitual residence to take measures necessary for the protection of the child. Such rules provide protection for the children concerned by ensuring that any international

relocation takes place in a consensual framework or following a judicial decision.

In debating various proposals submitted at the final diplomatic conference on the Convention in October 1980, the impact of a restriction on removal of a child from the jurisdiction was discussed. The following hypothetical was posed by Mr. Allan Leal of Canada:

> Custody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent. If the mother nevertheless leaves the jurisdiction without such consent, that constitutes wrongful removal.

See III Actes et Documents de la Quatorzieme Session, Child Abduction, 266 (1982). Mr. Van Boeschoten of the Netherlands noted that under the present terms of the Convention, the abducted child would have to be sent back immediately. *See id.* Mr. Van Boeschoten therefore saw no need to revise the present Article 3 to deal more expansively with rights of access. Mr. Eekelaar (observer for the Commonwealth Secretariat) also expressed the view that a parent with a right to be consulted about relocation would be covered in the present definition under Article 5. *Id.*

The above Hague Conference exchange sheds light on the important compromise in the Convention that provided parents who had control over relocation with a "right of custody" triggering an obligation of return. Special Commissions on the Convention have met on numerous occasions to review the operation of the Convention and examine the issue of "custody rights." In 1989, the Commission reached overall conclusions published at 29 I.L.M. 219 (1990) and alluded to litigation that had arisen concerning "rights of custody" under the laws of various countries. The Special Commission confirmed that "rights of

custody" constitute an autonomous concept and that such rights were not necessarily coterminous with rights referred to as "custody rights" created by the law of any particular country or jurisdiction. *See* 29 I.L.M. 219 (1990).

A Second Special Commission met again in 1993 and discussed the specific issue of whether *ne exeat* clauses when combined with rights of access created "custody rights" in the parent who did not have primary care of the child. The Report of the Second Special Commission reflected the view of the majority of the represented States that such restrictions on removal did indeed create "custody rights" under the Convention. *See* Report of Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction, *reprinted in* 33 I.L.M. 225, 234 (1994).

Courts in Member States to the Convention have from the earliest days of the instrument's operation accepted that a right of veto over the removal of a child from the jurisdiction can by itself amount to a right of custody under the Convention, and if breached, this right can trigger the summary return mechanism. The justification for such an interpretation lies in the fact that the Convention's whole purpose is to prevent the unilateral movement of children abroad. Moreover, in seeking to construct a partial definition of custody rights, Article 5 lays particular emphasis on this very right to determine the child's place of residence. Furthermore, the Convention as a whole, and Article 3 in particular, are drafted to ensure that the widest possible number of cases are brought within the instrument's scope.

Here, Ms. Fawcett held a statutory right of veto over the removal of Travis from the United Kingdom as a result of the terms of Sections 2(3) and 2(6) of the 1995 Act. The latter was supplemented both by the undertaking made by Mr. McRoberts to the Ayr Sheriff Court on February 15, 2001

that he would never remove Travis from Scotland to the United States and the Scottish court's own rights of custody. On March 29, 2001, the Ayr Sheriff Court found that by unilaterally removing Travis to the United States, Mr. McRoberts breached Section 2(3) and the undertaking and in so doing the removal of Travis was rendered wrongful. Specifically, the Sheriff Court held:

> That [Mr. McRoberts] has (1) unlawfully and wrongfully removed the child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994 outwith the jurisdiction of this Court without the express permission of [Ms. Fawcett] in contravention of her parental rights in terms of Sections 2(3) and 2(6) of the Children Scotland Act 1995; (2) failed to attend the diets of this Court on 26 and 29 March 2001 without an acceptable excuse; (3) removed the child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994, from the jurisdiction of this Court by taking him to the United States of America in breach of a specific undertaking given and recorded in the Interlocutor of 15 February 2001 not to do so pending determination of the present proceedings; and (4) continues to retain the said child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994 in the United States of America without disclosing his present whereabouts thereby depriving [Ms. Fawcett] of lawful contact with the said child.

(App. at 33a).

The Fourth Circuit chose to ignore this valid and undisputed order. Instead, it held that the substance of Section 2(3) of the 1995 Act was indistinguishable from *ne exeat* clauses at issue in *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 122 S. Ct. 342 (2001), and *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002). It erroneously held

that Section 2(3) of the 1995 Act did not confer "rights of custody" under the Convention. In light of the foregoing discussion, it can not be disputed that there is overwhelming evidence that the interpretation of the concept of "custody rights" by the Fourth Circuit was both parochial and erroneous.[3]

Yet aside from the crucial interpretative question at issue, there is the further problem that the Fourth Circuit's decision is now in conflict with at least one federal Court of Appeals

[3] Even putting aside the *ne exeat* clause issues, the Fourth Circuit's conclusion that Section 2(3) of the 1995 Act did not affirmatively vest Ms. Fawcett with "custody rights" under the Convention is in conflict with the United States Court of Appeals for the First Circuit's decision in *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000). In that case, the First Circuit properly recognized the drafter's intent that "custody rights" under the Convention's interpretation be determined broadly, holding that a father, out of wedlock, maintained Convention "rights of custody" over his daughter, under the doctrine of *patria potestas*. *Patria potestas* is equivalent to Scottish parental rights and responsibilities under the 1995 Act. *Patria potestas* is defined as the "relationship of rights and obligations that are held reciprocally...by the father and the mother." *Id.* at 457. Specifically, the First Circuit held that Article 329 of the Baja Sur Civil Code provided that "independently of who exercises *patria potestas* or custody, the relatives obliged by law to provide support have the right to visit their descendants or collateral relatives, and to have an adequate communication with them." *Id.* at 458. The First Circuit held that *patria potestas* plainly meant something "independent" from mere visitation rights as those were described in terms of "adequate communication;" whereas *patria potestas* rights were described through the "stronger language of 'adequate connection'" which implies a meaningful, decision-making role in the life and care of the child, and not the mere access to the child associated with visitation rights." *Id.* So here. Despite the equally strong and identical language of Section 2(3) in the 1995 Act affording Ms. Fawcett the right to maintain personal relations and direct contact with the child on a regular basis, the Court of Appeals concluded that such rights do not fall within the definition of "rights of custody" under the Convention.

and several State courts that have addressed this very issue. Moreover, the Fourth Circuit is also in conflict with the overwhelming majority of international precedent on the issue by our sister signatories to the Convention.

The Tenth Circuit Court of Appeals recently addressed the question of a *ne exeat* clause. *See Shealy v. Shealy*, 295 F.3d 1117 (10th Cir. 2002), *cert. denied*, 123 S. Ct. 603, 154 L.Ed.2d 521, 71 U.S.L.W. 3283 (Dec. 2, 2002). In *Shealy*, the applicable *ne exeat* clause had a peculiar exception for "military necessity" (the mother was in the United States Army and based in Germany). The Tenth Circuit ultimately held that the mother, who had surreptitiously applied for a transfer to the United States in the midst of an ongoing custody proceeding in Germany, had not wrongfully removed the child because the finding of "military necessity" by the district court was not clearly erroneous and thus there was no breach of that particular *ne exeat* clause. *Id.* Of particular import to the present case, however, is the fact that the *Shealy* court assumed that violation of an ordinary *ne exeat* clause would indeed constitute a breach of "rights of custody" under the Convention thereby creating a split with the Second, Fourth and Ninth Circuits on this crucial issue. *See id.* at 1122.

The Fourth Circuit's Opinion also conflicts with several existing United States State court decisions that have found custody rights under Articles 3 and 5 of the Convention where *ne exeat* rights were provided to one parent. *See David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (where father obtained court order preventing mother from leaving Ontario, such right constituted right of custody under the Convention); *Janakakis-Kostun v. Janakakis,* 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000) (holding that *ne exeat* order conferred custody rights upon father despite interim nature of ruling); *D'Assignies v.*

Escalante, No. BD 051876 (Cal. Super. Ct. Dec. 9, 1991) (custody rights under the Convention found where interim order afforded father only visitation rights but Court's *ne exeat* order precluded the mother from leaving France until a final order on custody had been reached).

Finally, by erroneously aligning itself with the Second and Ninth Circuits on the crucial interpretative concept of *ne exeat* clauses, the Fourth Circuit has further crystallized a clear division between courts of key Member States and various Courts of Appeal in the United States on this issue, resulting in uncertainty and damage to the Hague Convention. In reaching their respective judgments, the Second and Ninth Circuits recognized, in line with the decision of this Court in *Air France v. Saks*, 470 U.S. at 404, that the opinions of courts in other Contracting States are entitled to considerable weight. The Ninth Circuit wrongly held, however, that it could derive no guiding principle from foreign case law as regards the interpretation of *ne exeat* clauses, there being supposedly "no clear consensus." *Gonzalez*, at 953. The Second Circuit wrongly found the foreign decisions to be "few, scattered, conflicting, and sometimes, conclusory and unreasoned." *Croll*, at 143. The Fourth Circuit simply ignored the existence of the overwhelming foreign precedent.

Contrary to the views expressed in *Gonzalez* and *Croll*, there is undisputed acceptance of the view that a *ne exeat* clause or right of veto does amount to a right of custody for the purposes of the Convention in countries such as Australia, Austria, Canada, England, France, Hungary, Ireland, Israel, Germany, New Zealand and Scotland. For example, in *C. v. C.* [1989] 2 All E.R. 465 (Eng. C.A. Dec. 14, 1988), an Australian decree granting "custody to the mother and "joint guardianship" to both parents was found to create "custody rights" because the order gave the father the right to determine the child's place of residence. The first Special

Commission Meeting to Review the Operation of the Hague Convention stressed the importance of this ruling in its Overall Conclusions. *See* 29 I.L.M. 219 (1990). That Commission cited *C. v. C.* to sensitize authorities to the fact that the award of what is called "custody" to only one parent under domestic law does not mean that "rights of custody" within the intent of the Convention have been granted to a single parent. *Id.*[4]

The Israeli High Court of Justice also found that a parent whose consent was required before the child could be removed from the country had "custody rights" within the meaning of the Convention. *See* C.A. 5271/92 *Foxman v. Foxman* (H.C. 1992) (Isr.). The Australian courts have held that a custody order that provided reciprocal *ne exeat* rights for both parents created "rights of custody" in the otherwise non-custodial father. *See In the Marriage of R. v. R.*, 22 May 1991, Full Court of the Family Court of Australia (Perth). The view of the German courts on this issue was even reported in a United States federal district court case where the court was faced with subsequent litigation after a child removed from the United States had been ordered returned to the U.S. by a German court. In explaining the German court's determination that the father had "custody rights" under the Convention on the basis of a restriction on removal of the child from the United States the district court quoted from the German court's opinion:

> Even one who has only the right to object to the taking of the child to a foreign country has custody rights as per Article 3 and 5 of the Hague [C]onvention. Under the Hague Convention, the restriction on mobility

[4] *See also* Report of the Third Special Commission Meeting to Review Operations of Hague Convention on the Civil Aspects of International Child Abduction (Mar. 17-21, 1997), available at http://www.hcch.net/e/conventions/reports28e.html (Last visited July 15, 2003).

> connected therewith is to be accepted. The state of origin can and will, protect the right of the other parent beyond the right of mere visitation with such restrictions.

Morton v. Morton, 982 F. Supp. 675, 683-84 (D. Neb. 1997).

Recently, and perhaps most tellingly in our sister signatories' cases is *Sonderup v. Tondelli,* 2001 (1) SA 1171 (CC), a South African case, decided shortly after *Croll*. In that case, the South African Constitutional Court ordered the return of a child to Canada when the child was removed to South Africa in violation of a court order granting the mother custody and the father access but restricting either parent from removing the child from Canada. *Id.* at 1191. In rejecting the mother's contention that the father did not have "custody rights" under the Convention, the court noted with disapproval the majority opinion in *Croll* as "contrary to the weight of authority . . . that a non-removal provision does not found a right of custody." *Id.* at 1182. In approving the approach taken by Judge Sotomayor in her *Croll* dissent, the South African court pointed to her reasoning that "when a parent takes a child abroad in violation of *ne exeat* rights, that parent effectively nullifies the custody order of the country of habitual residence—exactly the mischief the Convention seeks to avoid."[5] *Id.*

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[5] *See also* **(Australia)** *State Central Authority v. Ayob*, (1997) FLC 92-746, 21 Fam. LR 567; *Director-General Department of Families, Youth and Community Care and Hobbs*, 24 September 1999, Family Court of Australia (Brisbane); **(Austria)** *2 Ob 596/91 OGH*, 05 February 1992, Oberster Gerichtshof (Supreme Court); **(Canada)** *Thomson v. Thomson* [1994] D.L.R. (4th) 253, 3 SCR 551; *Thorne v. Dryden-Hall*, (1997) 28 RFL (4th) 297; *Decision of 15 December 1998*, [1999] R.J.Q. 248; **(England)** *Re F.*, [1995] Fam. 224, [1995] 3 WLR 339. **(France)** *Ministère Public c. M.B.* 79 *Rev. crit.* 1990, 529, note Y. Lequette; **(Germany)** *2 BvR 1126/97*, Federal Constitutional Court of Germany (Bundesverfassungsgericht), 18 July 1997; *10 UF 753/01*,

It is to be regretted that only in the United States have decisions recently emerged rejecting the proposition that a right of veto cannot amount to a Convention right of custody particularly when State courts in this country are used to entering such orders themselves in custody cases and when this country expects our sister signatories to honor such *ne exeat* clauses when the United States is the requesting state. Uniformity of interpretation, both nationally and internationally, is of critical importance. Absent a uniform interpretation, potential abductors will be encouraged to abduct children here, believing they can exploit the United States' minority legal interpretation and thereby avoid the Convention's plain language and application. *See Mozes v. Mozes*, 239 F.3d 1067, 1072 (9th Cir. 2001). That Congress recognized the international character of the Convention's provisions and "need for uniform international interpretation" is reflected in ICARA, Section 11601(b)(3) (stating that "(3) [i]n enacting this chapter the Congress recognizes (A) the international character of the Convention; and (B) the need for uniform interpretation of the Convention").

Clarity is now required with respect to this aspect of the definition of "rights of custody." Only this Court may best address the unprecedented confusion surrounding the various types of *ne exeat* clauses as well as their relationship to the

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Oberlandesgericht Dresden (High Regional Court), 21/01/2002; **(Hungary)** *Mezei v. Biro*, (Capital Court as Appellate Court), June 16, 1998 [Incadat cite: HC/E/HU 329]; **(Ireland)** *M.S.H v. L.H.*, (Supreme Court of Ireland), July 27, 2000 [Incadat cite: HC/E/IE 319]; *W.P.P. v. S.R.W.*, (Supreme Court of Ireland), April 14, 2000 [Incadat Cite: HC/E/IE 271]; **(Israel)** *Tourna v. Meshulem*, C.A. 1648/92 (H.C. 1992); **(New Zealand)** *Secretary for Justice v. Abrahams*, Family Court at Taupo, September 3, 2001 [Incadat Cite: HC/E/NZ 492]; *F. v. M.*, District Court at Wellington, July 18, 1995 [Incadat Cite: HC/E/NZ 249]; *G. v. B.*, Court of Appeal, December 2, 1994 [Incadat Cite: HC/E/NZ 66]; **(Scotland)** *Bordera v. Bordera*, 1995 S.LT. 1176.

objectives of the Convention. *See* Linda Silberman, *Patching Up The Abduction Convention: A Call For A New International Protocol and a Suggestion For Amendments To ICARA*, 38 Tex. Int'l. L.J. 41, 46-48 n.35, 36 (Winter 2003). It must also be recognized that American parents holding a right to veto the removal of their children from the United States have significantly benefited from the broad interpretation of custody rights given in other Contracting States when the United States has requested the return of U.S. children.[6] Accordingly, to allow the *Fawcett* ruling to stand without examination by the Supreme Court would be enormously disruptive to the Convention both within and outwith the United States.

The effect of the Fourth Circuit's Opinion has been to create the untenable situation whereby the original abduction of Travis from Scotland is now no longer deemed wrongful in the "abducted-to State," but the child is living again in the "abducted-from" State, his habitual residence,[7] in the jurisdiction of the only court that has ever exercised control over the custody issues in this case. Yet the Fourth Circuit would have the child removed again and would ignore the valid and undisputed custody jurisdiction of Scotland, the valid and undisputed Sheriff Court's orders and Scots law.

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[6] *See* **Australia**: *State Central Authority v. Ayob* (1997) F.L.C. 92-746, 21 Fam. L.R. 567 [Incadat Cite: HC/E/AU 232]; **England**: *C. v. C. (Minors) (Child Abduction)* [1992] 1 F.L.R. 163, [1992] Fam. Law 199 [Incadat Cite: HC/E/UKe 35]; **Germany**: 10 U.F. 753/01; Oberlandesgericht Dresden (High Regional Court), 21/01/2002 [Incadat Cite: HC/E/DE 486]; **Israel**: *G. v. G.*, 14 August 1995, C.A. 5532/93 (Isr. S. Ct.) The Supreme Court of Israel, sitting as a Court of Civil Appeals [Incadat Cite: HC/E/IL 355]; **New Zealand**: *Wolfe v. Wolfe* [1993] N.Z.F.L.R. 277 [Incadat Cite: HC/E/NZ 303].

[7] *See Silverman v. Silverman*, 2003 WL 21788087 (8th Cir. 2003).

II. The Fourth Circuit Now Stands In Direct Conflict With The Eleventh Circuit On Whether A Child's Return To The State of His Habitual Residence, Pursuant to A District Court's Return Order, Effectively Moots Any Appeal.

The issue of mootness is a critical question necessary for the application of the Convention in all cases in which a return order is issued. In order for district courts and Courts of Appeal in the United States to be sure in their rulings on petitions for the return of children and on corresponding petitions for stays of judgment pending appeal, this Court must provide a clear approach on the mootness issues attendant to the return of a child to a foreign country. Ms. Fawcett contends that the return of Travis to the Scottish jurisdiction pursuant to the District Court's Return Order, and the McRoberts' failure to seek a stay of that order pending appeal, mooted their appeal to the Fourth Circuit. The Fourth Circuit, however, concluded that the McRoberts' appeal was not moot. This decision is now in direct conflict with the Eleventh Circuit's holding in *Bekier v. Bekier*, 248 F.3d 1051, 1055 (11th Cir. 2001) in which that court held that when "[the child] returned to Israel with his father [pursuant to a return order] we became powerless to grant the relief requested by Ms. Bekier. And so we must dismiss this appeal."[8]

As a threshold matter, a court has "no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before [it].'" *Church of Scientology v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 449, 121 L.Ed.2d 313 (1992) (quoting *Mills v. Green*, 159

[8] *See also March v. Levine*, 136 F. Supp. 2d 831, 861 (M.D. Tenn. 2000), *aff'd*, 249 F.3d 462 (6th Cir. 2001) (affirming a stay order, without deciding the mootness issue, but recognizing that "immediate return of the children to Mexico may effectively moot any appeal").

U.S. 6512, 653 (1895)). It is undisputed that "compliance [with a trial court's order] does not [ordinarily] moot an appeal [of that order] if it remains possible to undo the effects of compliance or if the order will have a continuing impact on future action." 13A Charles A. Wright, et al., *Federal Practice & Procedure* § 3533.2 (2d ed. 1984). If, however, an event occurs prior to, or during, the pendency of an appeal "that makes it impossible for this court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed." *Id.* at 449.

As in *Bekier*, Ms. Fawcett petitioned the District Court for the return of Travis to his habitual residence of Scotland. The District Court ruled that Mr. McRoberts had wrongfully removed Travis from Scotland under the Convention and ordered that he be returned to Scotland forthwith. Travis was returned to the custody of Ms. Fawcett and the Scottish court immediately thereafter. Ms. Fawcett achieved the relief she sought in her Hague Convention petition. At the conclusion of the District Court proceeding, Mr. McRoberts opted not to seek a stay of the District Court's Order, pending his appeal to the Court of Appeals, thereby failing to take all necessary steps to preserve the appeal and maintain the status quo.[9] In

[9] In its opinion, the Fourth Circuit stated that it would nevertheless have ancillary jurisdiction to consider the McRoberts' appeal by virtue of the District Court's order awarding attorneys' fees to Ms. Fawcett. Such a collateral issue would likely fall within an exception to the mootness doctrine. (App. at 19a). Although the Fourth Circuit may be correct in this determination, such a ruling appears to be in conflict with several appellate courts' holdings that have found that similar issues are only independently reviewable when the underlying merits are declared moot. *See Zucker v. Occidental Petroleum Corp.*, 192 F.3d 1323, 1329 (9th Cir. 1999); *GMRI, Inc. v. EEOC*, 149 F.3d 449 (6th Cir. 1998). The clear split between the Fourth and Eleventh Circuits on this issue makes this case a good vehicle for this Court to decide the important merits question, while simultaneously giving it an opportunity to address the mootness issue if it chooses to do so.

fact, only after Travis' return to the jurisdiction of the Scottish court, did Mr. McRoberts lodge an appeal. As in *Bekier*, when Travis returned to Scotland to his mother and when the purpose of the Hague Convention was fulfilled, the Court of Appeals became powerless (as did the District Court on remand) to grant the relief requested by Mr. McRoberts and should have dismissed his appeal.[10]

Notwithstanding this error, and contrary to the holding in *Bekier*, the Court of Appeals endeavored to unscramble the egg, concluding that "no law of physics would make it impossible for Ms. Fawcett to comply with an order by the district court [on remand] that she return Travis to the United States." (App. at 16a). But Scotland is the only habitual residence Travis has ever had and it is up to Scots law alone to determine the child's place of residence going forward. Despite the satisfaction of all of the elements of the Convention and the return of Travis to the only court that has ever had jurisdiction over the merits of the custody dispute -- the stated purpose of the Convention -- the Fourth Circuit now seeks to pry Travis from the only court with legitimate custody jurisdiction.

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[10] The Fourth Circuit's attempted use of the Child Abduction and Custody Act 1985 and Family Law (Scotland) Act 1986 § 26 as a mechanism for enforcing its judgment is impossible. As a threshold matter, the enforcement provisions of the 1985 Act refer to a Convention to which the United States is not a party – the European Convention on Recognition and Enforcement of Decisions Concerning Custody of Children, dated 20 May 1980. *See* Child Abduction and Custody Act 1985, c. 60, Pt. II, § 12(1). Next, the construction of Section 26 is such that the child must be habitually resident in the foreign State at the time the return order is made, which was not the case here. Consequently, there exists no possibility of an order providing for the return of Travis to the United States being recognized under Section 26 of the Family Law (Scotland) Act 1986.

That the decision in *Bekier* is no doubt the preferred approach of the United States Government in this instance is best evidenced by the United States Solicitor General's Amicus Curiae Brief to this Court on the Petition for Writ of Certiorari ("Amicus Brief") in *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999), *cert. denied,* 531 U.S. 811 (2000), in which the Solicitor General concluded:

> [B]ecause petitioner did not succeed in securing a stay pending appeal, Bronte Janakakis was delivered into respondent's custody and returned to Greece in June 1998. She has apparently been living in Greece, and subject to the plenary custody jurisdiction of the Greek courts, since that time. . . . Although the Kentucky Court of Appeals proceeded to decide this case on appeal, and although the parties make no mention of the issue, the case appears to be effectively moot. In any event, nothing in the Convention would require courts or other authorities in Greece to give binding effect to any judgment of this Court purporting to reverse or vacate an order of return that has already been fully executed, and it is at best uncertain what other legal or practical effects, if any, might attend such a judgment. That uncertainty counsels strongly against granting review in this case. *Amicus Brief,* at 19.

Similarly, because nothing in the Convention (or any other statute) would require Scottish courts to give binding effect to a decision of the Court of Appeals (or the District Court on remand) or even this Court purporting to vacate an order of return that has already been fully executed, this Court should find that the Court of Appeals erred in failing to hold that the McRoberts' appeal was moot.

CONCLUSION

WHEREFORE, Jean Fawcett respectfully requests that her Petition for Writ of Certiorari be granted.

Respectfully submitted,

STEPHEN J. CULLEN
Counsel of Record
Miles & Stockbridge P.C.
600 Washington Avenue
Towson, Maryland 21204-3965
(410) 821-6565

JAMISON G. WHITE
Of Counsel
Miles & Stockbridge P.C.
10 Light Street
Baltimore, MD 21202-1487
(410) 727-6464
Counsel for Petitioner,
Jean Fawcett

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2406
CA-01-59

[Filed May 12, 2003]

JEAN FAWCETT,	)
Petitioner-Appellee,	)
	)
v.	)
	)
COLIN MCROBERTS; TAMMY MCROBERTS,	)
Respondents-Appellants.	)
	)

ON PETITION FOR REHEARING AND REHEARING EN BANC

The appellants petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ _____
Patricia S. Connor
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 01-2406
(CA-01-59)

[Filed May 6, 2003]

JEAN FAWCETT,
Petitioner-Appellee,

v.

COLIN MCROBERTS; TAMMY MCROBERTS,
Respondents-Appellants.

ORDER

The court further amends its opinion filed April 15, 2003, and amended April 18, 2003, as follows:

On page 12, second full paragraph – the first sentence is deleted, and is replaced with the following:

> As Sheriff David Kelbie noted in his commentary to the Scottish Court of Sessions's opinion in *Donofrio v. Burrell*, 2000 S.C.L.R. 465 at 16 (1999), a parent "clearly" loses "[her] 'rights of custody' [under the

Convention if the other parent is awarded a residence order.

For the Court - By Direction

/s/ _____
Patricia S. Connor
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2406
(CA-01-59)

[Filed April 18, 2003]

JEAN FAWCETT,	)
Petitioner-Appellee,	)
	)
v.	)
	)
COLIN MCROBERTS; TAMMY MCROBERTS,	)
Respondents-Appellants.	)
	)

ORDER

The court amends its opinion filed April 15, 2003, as follows:

On the cover sheet, section 7, line 6 – the counsel listing on brief "for Appellants" is corrected to read "for Appellee."

For the Court - By Direction

/s/ _____
Patricia S. Connor, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2406
CA-01-59

[Filed April 15, 2003]

JEAN FAWCETT,	)
Petitioner-Appellee,	)
	)
v.	)
	)
COLIN MCROBERTS; TAMMY MCROBERTS,	)
Respondents-Appellants.	)
	)

Appeal from the United States District Court for the Western District of Virginia at Lynchburg

JUDGMENT

In accordance with the written opinion of this Court filed this day, the Court reverses the judgment of the District Court. This case is remanded to the District Court for further proceedings consistent with the Court's opinion.

/s/ _____
Patricia S. Connor, Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-2406

**[Argued January 24, 2003,
Decided April 15, 2003]**

JEAN FAWCETT,
Petitioner-Appellee,

v.

COLIN MCROBERTS; TAMMY MCROBERTS,
Respondents-Appellants.

Appeal from the United States District Court
for the Western District of Virginia, at Lynchburg
Norman K. Moon, District Judge

JUDGES:
Before LUTTIG, MOTZ, and TRAXLER, Circuit Judges. Judge Motz wrote the opinion, in which Judge Luttig and Judge Traxler joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge:

After Colin McRoberts and Jean Fawcett divorced, Mr. McRoberts moved from Scotland to Virginia with the couple's son, Travis. Ms. Fawcett filed a petition in federal court in Virginia requesting that the court order Travis's return to Scotland pursuant to the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"), and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C.A. § § 11601-11610 (West 1995). The district court granted Ms. Fawcett's petition and Mr. McRoberts has appealed. Because the district court erred in its interpretation and application of Scottish law, we reverse and remand to the district court for further proceedings consistent with this opinion.

I.

Mr. McRoberts and Ms. Fawcett married in Scotland in 1986. During their marriage they had two children: Melody (whose custody is not at issue here), in 1990, and Travis, in 1994. By 1998, their marriage was experiencing difficulties, and on November 20, 1998, a Scottish Sheriff Court issued a decree divorcing Mr. McRoberts and Ms. Fawcett. This divorce decree made a "Residence Order in respect of . . . TRAVIS COLIN PATRICK MCROBERTS . . . requiring that [he] live with" Mr. McRoberts, and a "Contact Order" that allowed Ms. Fawcett contact with Travis on weekends and other specified times, for two weeks during the summer, and one week during each of the October, Christmas, and Easter holidays.

Over the next two and a half years, Ms. Fawcett made more than fifty attempts to modify her contact order. The record reveals only two instances in which the Sheriff Court modified the order; in each case, it imposed *greater limitations* on Ms. Fawcett's contact rights. A February 11, 2000 order restricted Ms. Fawcett's visits with Travis to "every second Saturday between 10 a.m. and 5 p.m.," and required that the visits be supervised. A June 23, 2000 order created a fourweek contact cycle granting Ms. Fawcett no contact in Week 1, "residential contact" on the weekend of Week 2, no contact in Week 3, and Saturday contact in Week 4.

In February 2001, Ms. Fawcett grew concerned that Mr. McRoberts might take Travis to the United States and sought an interdiction order from the Sheriff Court to prevent Mr. McRoberts from doing so. On February 15, the Sheriff Court "refused [the] same as Mr. McRoberts . . . gave an undertaking to the Court that he will not remove the aforementioned children from Scotland to the United States. . . ." The court then adjourned the hearing "for further evidence to be led."

Sometime shortly after this hearing, Mr. McRoberts and his second wife, Mrs. Tammy McRoberts, moved to the United States with Travis, and took efforts to conceal his whereabouts from Ms. Fawcett.

In an opinion issued March 29, 2001, the Sheriff Court, "on the Motion of [Ms. Fawcett] Sisted the cause pending the

outcome of a 'Hague Convention' application to be made by [Mr. McRoberts]."[1] The court held that Mr. McRoberts

> (1) unlawfully and wrongfully removed [Travis] outwith the jurisdiction of this Court without the express permission of [Ms. Fawcett] in Contravention of her parental rights in terms of Section 2(3) and 2(6) of the Children Scotland Act 1995; (2) failed to attend the diets of this Court on 26 and 29 March 2001 without an acceptable excuse; (3) removed [Travis] from the jurisdiction of this Court by taking him to the United States of America in breach of a specific under taking . . . not to do so pending determination of the present proceedings; and (4) Continues to retain [Travis] in the United States of America without disclosing his present whereabouts thereby depriving [Ms. Fawcett] of lawful con tact with the said child.

The Sheriff Court then found Mr. McRoberts in contempt of court, fined him, and instructed the Sheriff Clerk to "take all necessary steps . . . to recover" the fine.

On September 25, 2001, a lawyer acting for Ms. Fawcett filed a Petition for Return of Child and a Request for Emergency Ex Parte Hearing in the United States District Court for the Western District of Virginia. The court granted her request for an emergency *ex parte* hearing, which it held later that day. The court also held a hearing on that same day

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[1] *Webster's Third New International Dictionary* 2128 (1993) defines "Sist" as "1. *chiefly Scot*: to bring into court: SUMMON 2. *chiefly Scot*: a stay or suspension of legal proceedings; *also*: an order for a stay of proceedings."

at which Mr. McRoberts was present and testified. In that proceeding, the court verbally ordered Mr. McRoberts not to remove Travis from the jurisdiction or seek any state court order. On October 2, 2001, the court held another hearing on Ms. Fawcett's petition, at which Mr. McRoberts again presented the only testimony.

On October 11, the district court granted Ms. Fawcett's petition and ordered that Travis be taken into custody by the Bedford County Department of Social Services and returned to the jurisdiction of the Sheriff Court in Ayr, Scotland. *Fawcett v. McRoberts*, 168 F. Supp. 2d 595 (W.D. Va. 2001). Mr. McRoberts complied with this order and Travis was returned to Scotland. The court also ordered Mr. McRoberts to pay costs and Ms. Fawcett's attorney's fees. Mr. McRoberts filed a timely appeal from both orders.

II.

As a threshold matter, we must determine whether Mr. McRoberts's appeal is moot. We have "no authority' to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before'" us. *Church of Scientology v. United States*, 506 U.S. 9, 12, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 40 L. Ed. 293, 16 S. Ct. 132 (1895)). Though Ms. Fawcett does not contend that the case is moot, a court must resolve issues such as mootness, that concern its own jurisdiction, even when the parties do not raise such issues. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998); *Iron Arrow Honor Soc'y v.*

Heckler, 464 U.S. 67, 70, 78 L. Ed. 2d 58, 104 S. Ct. 373 (1983).

Of course, "compliance [with a trial court's order] does not [ordinarily] moot an appeal [of that order] if it remains possible to undo the effects of compliance or if the order will have a continuing impact on future action." 13A Charles A. Wright, et al., *Federal Practice & Procedure* § 3533.2 (2d ed. 1984); *see also Graddick v. Newman*, 453 U.S. 928, 937, 69 L. Ed. 2d 1025, 102 S. Ct. 4 (1981) (concluding that Court had the "power . . . to enter an injunction ordering restoration of the prior status quo"); *id.* at 945 n.* (Rehnquist, J., writing separately) ("Issuance of a court's mandate or obedience to its judgment does not bar timely appellate review.") (citations omitted)). However, because in compliance with the district court's order in this case Travis has returned to Scotland, we must assure ourselves that a decision by this court can "affect the matter in issue." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted). We believe that a decision favorable to Mr. McRoberts can clearly "affect the matter in issue" in this case.

Indeed, our recent opinion in *Miller v. Miller*, 240 F.3d 393 (4th Cir. 2001), is an implicit adoption of this view. In that case we considered the merits of an appeal from an order returning a child to Canada, even though the father had complied with the order, and the child was in Canada at the time of the appeal. *Id.* at 395, 404. Although we ultimately affirmed the district court's order, we could not have considered the merits of the appeal if the case had been rendered moot by the child's return to Canada pursuant to the

district court's order. *See Steel Co.*, 523 U.S. at 94 (rejecting notion that courts may exercise "hypothetical jurisdiction").

The overwhelming majority of other courts have also evidenced their agreement with this position by routinely considering the merits of an appeal from an order returning a child to a foreign country, even when compliance with the order has resulted in the child's presence in a foreign country. *See, e.g., Ohlander v. Larson*, 114 F.3d 1531, 1538-39 (10th Cir. 2000) (rejecting mother's arguments that her petition should be dismissed because it "was moot and because [the child] was no longer in Utah" and noting that accepting such arguments "could give parents an undue incentive to flee from Hague Convention proceedings"); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843 (Ky. Ct. App. 1999) (reviewing merits of an appeal, even after child had been returned to Greece in compliance with trial court order made pursuant to Convention and ICARA); *see also, e.g., Rydder v. Rydder*, 49 F.3d 369 (8th Cir. 1995) (reviewing merits of appeal from district court order that child be returned to foreign country pursuant to Convention and ICARA and in which no stay appears to have been issued); *Dalmasso v. Dalmasso*, 269 Kan. 752, 9 P.3d 551 (Kan. 2000) (same); *Sampson v. Sampson*, 267 Kan. 175, 975 P.2d 1211 (Kan. 1999) (same); *Harkness v. Harkness*, 227 Mich. App. 581, 577 N.W.2d 116 (Mich. Ct. App. 1998) (same).

Indeed, at least two appellate courts have recently granted the precise relief Mr. McRoberts seeks, *i.e.*, reversal of a trial court's order returning a child to a foreign country even after the child has left the United States. *See In re Marriage of Jeffers*, 992 P.2d 686, 689, 692 (Co. Ct. App. 1999) (reversing "the portion of the judgment returning the children

to Greece" notwithstanding fact that children had already been returned to Greece in compliance with original order); *Bless v. Bless*, 318 N.J. Super. 90, 723 A.2d 67, 75 (N.J. Super. Ct. 1998) (reversing and remanding to trial court, concluding "that jurisdiction has not been obliterated by [the child's] court-ordered presence in Switzerland"). Obviously these courts too concluded that their decision would "affect the matter in issue." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted).

Notwithstanding this wealth of authority, and without acknowledging any of it, the Eleventh Circuit recently did dismiss as moot an appeal from a district court's order that a child be returned to a foreign country. *Bekier v. Bekier*, 248 F.3d 1051 (11th Cir. 2001). The district court had ruled that Ms. Bekier had wrongfully removed the child from his habitual residence in Israel. *Id.* at 1053. Ms. Bekier appealed, requesting that the court reverse the decision below or remand for further evidentiary hearings. *Id.* at 1054. While her appeal was pending, Mr. Bekier returned to Israel with their son. The Eleventh Circuit held Ms. Bekier's appeal moot because the return of the child to Israel left the court "powerless to grant the relief requested by Ms. Bekier." *Id.* at 1055; *cf. March v. Levine*, 136 F. Supp. 2d 831, 861 (M.D. Tenn.), aff'd, 249 F.3d 462 (6th Cir. 2001) (granting stay of order to return child, "recognizing that immediate return of the children to Mexico *may* effectively moot any appeal" (emphasis added)).

It is unclear why the *Bekier* court came to this conclusion. Although it cites several cases that purportedly support its mootness holding, all of those cases involve markedly different facts. For example, the *Bekier* court relied heavily

on *B&B Chemical Co., Inc. v. United States EPA*, 806 F.2d 987, 989 (11th Cir. 1986), a case holding that a challenge to the execution of a warrant to enter property was moot because the warrant had already been executed.[2] *B&B Chemical* was moot, however, because it would have been literally impossible to "un-enter" the property, even if the court had so ordered. The same logic applied to finding the university's appeal moot in *University of Texas v. Camenisch*, 451 U.S. 390, 398, 68 L. Ed. 2d 175, 101 S. Ct. 1830 (1981), where the university had complied with a court order to provide Camenisch with a sign-language interpreter, and Camenisch had graduated while the appeal was pending. Because the interpreter had already been provided, it would have been literally impossible for the court to un-provide the service (short of reversing time -- a power that, perhaps regrettably, Congress has not yet granted the United States Courts of Appeals). As one court has noted, in some cases, like these,

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[2] The *Bekier* court also cited two unpublished opinions in which a case involving a petition under the Hague Convention was dismissed as moot. *See Bekier*, 248 F.3d at 1055 (citing *Brown v. Orange County Dep't of Soc. Serv.*, 1996 U.S. App. LEXIS 15921 (9th Cir. July 1, 1996); *Mahmoud v. Mahmoud*, 1997 U.S. Dist. LEXIS 2158, 1997 WL 43524 (E.D.N.Y. Jan. 29, 1997)). These cases, however, like *B&B Chemical*, have no bearing on the mootness of Mr. McRoberts's appeal. Though both cases involved children who had been removed from the United States, this was not the basis of the courts' mootness holding. Rather, both the appellant in *Brown v. Orange County*, and the petitioner in *Mahmoud*, already had physical custody of their children, and had thus received the primary relief they sought. Mr. McRoberts, however, has plainly not yet received the relief he now seeks.

once an action has been taken "there is no way to unscramble the egg." *In re Ford*, 110 F.3d 954, 963 (3d Cir. 1997).

Such cases, however, present altogether different issues than the case at hand. Here, no law of physics would make it impossible for Ms. Fawcett to comply with an order by the district court that she return Travis to the United States. To the contrary, such orders are fully within the district court's power and are commonly issued by courts in the United States. *See, e.g.*, *Ohlander*, 114 F.3d at 1535; *Goldstein v. Goldstein*, 229 Ga. App. 862, 494 S.E.2d 745, 747 (Ga. Ct. App. 1998); *Hernandez v. Branciforte*, 55 Mass. App. Ct. 212, 770 N.E.2d 41, 45, 49 (Mass. Ct. App. 2002); *Roszkowski v. Roszkowska*, 274 N.J. Super. 620, 644 A.2d 1150, 1160 (N.J. Super. Ct. 1993); *In re Vernor*, 94 S.W.3d 201, 206 (Tex. Ct. App. 2002); *Johnson v. Johnson*, 26 Va. App. 135, 493 S.E.2d 668, 671 (Va. Ct. App. 1997); *see also, e.g.*, *Horlander v. Horlander*, 579 N.E.2d 91, 97 (Ind. Ct. App. 1991) (concluding that court had jurisdiction to issue custody order even though child was in foreign country); *Ivaldi v. Ivaldi*, 147 N.J. 190, 685 A.2d 1319, 1326 (N.J. 1996)(same); *Middleton v. Middleton*, 227 Va. 82, 314 S.E.2d 362, 367 (Va. 1984) (same).

One concern that may have prompted the *Bekier* court's decision is that while the remedy Ms. Bekier sought might not have been *impossible* to grant, as it was in *B&B Chemical*, the *Bekier* court may have believed that there would have been no mechanism for effectively *enforcing* an order that a child living outside the United States be returned to this country. *See Bekier*, 248 F.3d at 1054 ("Ms. Bekier's potential remedies now lie in the Israeli courts. Any words by us would be merely advisory.").

As an initial matter, it is not at all clear to us that a lack of effective methods for enforcing a court order necessarily means that the court's opinion "cannot affect the matter in issue," *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted), and therefore renders the case moot. In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), for example, there was little hope that any court would be able to enforce a judgment against Radovan Karadzic, who was, at the time, the President of the self-proclaimed Bosnian-Serb republic "Srpska." *See* Jerry Adler, *Suing Bin Laden*, American Lawyer, Nov. 2001 at 30 (noting that even one of the plaintiffs' lawyers didn't "really expect the plaintiffs to collect anything from Karadzic, who is still a fugitive from the International War Crimes Tribunal at The Hague."). Nevertheless, the Second Circuit did not dismiss the plaintiffs' claims as moot, but rather after reversing the district court's holding that no jurisdiction existed, remanded to allow the case to proceed. *Kadic*, 70 F.3d at 236. Nor was enforcement regarded as a stumbling block in the cases cited above in which courts ordered a child returned to the United States from a foreign country. *See ante* at 7-8.

However, even if, hypothetically, the lack of an enforcement mechanism could leave a court completely unable to "affect the matter in issue," and render an appeal moot, Mr. McRoberts's appeal would still not be moot because he does have a mechanism for enforcing a judgment by this court or the district court on remand. The Child Abduction and Custody Act 1985, the United Kingdom's analogue to ICARA, codifying the Hague Convention there, provides that "[a] decision to which [Articles 7 and 12 of the Hague Convention] apply which was made in a Contracting State other than the United Kingdom shall be recognized in

each part of the United Kingdom as if made by a court having jurisdiction to make it in that part." 1985, c. 60, Pt. II, § 15. Furthermore, that statute explicitly contemplates a revocation or variation of an order issued by a Contracting State and previously recognized by a court in the United Kingdom, and provides that in such circumstances the United Kingdom court shall either cancel its original order, § 17(2), or vary it, § 17(3). *See* c.60, Pt. II, § 17. Thus, Mr. McRoberts would be able to seek enforcement through the United Kingdom's courts of an order that Ms. Fawcett and Travis return to Virginia, were the district court, on remand, to issue such an order.

Although Mr. McRoberts could have proceeded directly to the United Kingdom's courts without seeking a reversal of the district court's order in the United States, there can nonetheless be no question that an order from the district court that Ms. Fawcett return to the United States with Travis would "affect the matter in issue in [this] case." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted). Such an order would permit Mr. McRoberts to appear in the Scottish courts simply to seek enforcement of the United States judgment, rather than to re-argue the merits of any custody dispute respecting Travis (if, indeed, there even is a dispute over who has the right to custody of Travis).

Furthermore, even if the United Kingdom's courts did not recognize the order of a United States court, such an order could still "affect the matter in issue." *Id.* For example, Ms. Fawcett could comply with the court's order of her own volition. Or, if Ms. Fawcett failed to comply with the order, she could be held in contempt, and penalties could be assessed. *See, e.g.*, *Ohlander*, 114 F.3d at 1535; *Hernandez*,

770 N.E.2d at 49. Alternatively, it seems not too remote a possibility that Ms. Fawcett could at some point return to the United States with Travis, at which time Mr. McRoberts could seek to enforce such an order. *Cf. Michigan v. Doran*, 439 U.S. 282, 285 n.2, 58 L. Ed. 2d 521, 99 S. Ct. 530 (1978) (rejecting argument that appeal from order granting writ of habeas corpus was moot because the prisoner had been released and could no longer be located (citation omitted)); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 307-08, 91 L. Ed. 308, 67 S. Ct. 313 (1946) ("Though the writ has been granted and the prisoner released, the appellate court by what it does is not rendering an opinion and issuing an order which cannot affect the litigants in the case before it. Affirmance makes the prisoner's release final and unconditional. Reversal undoes what the habeas corpus court did and makes lawful a resumption of the custody." (citations omitted)).

In sum, it is clear that a decision reversing the district court's order in this case does not violate the prohibition against "opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology*, 506 U.S. at 12 (internal quotation marks and citation omitted). We therefore conclude that Mr. McRoberts's appeal is not moot, and turn now to the merits of that appeal.[3]

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[3] Even if Mr. McRoberts's appeal were otherwise moot, we would still have ancillary jurisdiction to consider his appeal based on the district court's order that Mr. McRoberts pay Ms. Fawcett's attorney's fees and costs. *See Arlington County Republican Comm. v. Arlington County*, 983 F.2d 587, 596 (4th Cir. 1994) (denying

III.

In an action under the Convention and ICARA, a petitioner must "establish, by a preponderance of the evidence, that her child[ ] was 'wrongfully removed or retained within the meaning of the Convention.'" *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001) (quoting 42 U.S.C. § 11603(e)(1)(A)). The Convention provides that:

> The removal or the retention of a child is to be considered wrongful where -
>
> [a] it is in breach of rights of custody attributed to a per son, an institution or any other body . . . under the law of the State in which the child was habitually resident, immediately before the removal or retention; and
>
> [b] at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Convention, art. 3.

In this case, the district court held that Mr. McRoberts wrongfully removed Travis from his habitual residence in Scotland, in breach of the "rights of custody," held by both

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motion to dismiss appeal as moot because appellate court's determination of underlying action "may affect the amount of the attorneys' fees award").

Ms. Fawcett and the Sheriff Court. The court also held that both Ms. Fawcett and the Sheriff Court were actually exercising their custody rights at the time of Travis's removal. We address first Ms. Fawcett's asserted rights of custody, and then those of the Sheriff Court.

A.

The Convention provides that the removal of a child is wrongful if "it is in breach of rights of custody," Convention, art. 3(a), with "rights of custody . . . including rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." Convention, art. 5(a). The Convention also defines, by contrast, "rights of access," which "include the right to take a child for a limited period of time to a place other than the child's habitual residence." Convention, art. 5(b).

The district court correctly noted that Section 2 of the Children (Scotland) Act provides that a parent has the right, *inter alia*, "'to have the child living with him *or otherwise to regulate the child's residence*' and 'if the child is not living with him, *to maintain personal relations and direct contact with the child on a regular basis*.'" *Fawcett*, 168 F. Supp. 2d at 601 (quoting Children (Scotland) Act § § 2(1)(a), (c)) (emphasis added by district court). The court found that this statute gave Ms. Fawcett, as one of Travis' parents, the right to determine his residence, and thus, "rights of custody" as defined by the Convention.

The rights provided under § 2 of the Children (Scotland) Act, however, can be modified by court order or decree. Section 11 of that statute explicitly provides that a Sheriff

Court may make "an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child." Children (Scotland) Act § 11(2)(a).[4]

In this case, the Sheriff Court did precisely that -- the decree it issued divorcing Mr. McRoberts and Ms. Fawcett modified the parental rights that Ms. Fawcett would have otherwise had under § 2 of the Children (Scotland) Act. The "Residence Order" contained in the decree gives Mr. McRoberts the exclusive power to determine Travis's residence, thereby necessarily depriving Ms. Fawcett of that same right. Indeed, Ms. Fawcett's counsel conceded at oral argument that Ms. Fawcett had no right to determine Travis's residence within Scotland, and that that right rested exclusively with Mr. McRoberts.

As the Sheriff David Kelbie noted in his commentary to the Scottish Court of Session's opinion in *Donofrio v. Burrell*, 2000 S.C.L.R. 465 at 16 (1999), a parent "clearly" loses "[her] 'rights of custody' [under the Convention] if the other parent is awarded a residence order." Thus, Ms. Fawcett's attorney admitted before the district court that "under the divorce decree and the subsequent interim orders, [Mr. McRoberts had] the notion of custody." *See also In re H (A Minor)*, 1999 WL 1319095, at *2 (House of Lords 1999) (noting without disapproval lower court's rejection of a parent's claim to "rights of custody" under Convention based

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[4] Ms. Fawcett's similar argument that § 3 of the Children (Scotland) Act grants her affirmative rights as a mother, in addition to her rights as a parent under § 2, is subject to similar analysis (and rejection) because the rights under § 3, like those under § 2, can be modified by court orders made pursuant to § 11.

on contact order and parent's failure to appeal the issue). Because the divorce decree of the Sheriff Court deprived Ms. Fawcett of her right to determine Travis's place of residence, the district court erred in holding that Ms. Fawcett had "rights of custody" as that term is used in the Convention.[5]

While Ms. Fawcett has conceded that she had no right to determine Travis's residence within Scotland, she argues that § 2(3) of the Children (Scotland) Act gives her some rights to determine Travis's place of residence, and thereby confers upon her "rights of custody" under the Convention. Section 2(3) of the Children (Scotland) Act provides that, "without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without

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[5] The district court acknowledged that § 11 of the Children (Scotland) Act permitted a court to modify the parental rights provided under § 2. But after noting that "the contempt order [against Mr. McRoberts] stated that Travis's abduction was 'in Contravention of her parental rights,'" the court found no "evidence that the sheriff court in Ayr has deprived Ms. Fawcett of her parental rights." *Fawcett*, 168 F. Supp. 2d at 602 n.11 (quoting Sheriff Court's contempt order). However, as explained above, the Sheriff Court's original divorce decree (not the later contact or contempt orders) deprived Ms. Fawcett of certain parental rights. Of course, the divorce decree also permitted Ms. Fawcett to retain other parental rights. Thus, while Travis's removal may have been "in contravention" of Ms. Fawcett's parental right to maintain contact with Travis, the removal was not "wrongful" within the terms of the Convention because the Sheriff Court had previously deprived Ms. Fawcett of the parental right to determine Travis's place of residence, and therefore she did not retain "rights of custody" of Travis under the Convention.

the consent of a person described in subsection (6) below." Subsection (6), in turn, applies subsection (3) to a person "who for the time being has and is exercising in relation to him" either the right "to have the child living with him or otherwise to regulate the child's residence" or "if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis." Children (Scotland) Act § § 2(6), 2(3)(a) & (c). Assuming Ms. Fawcett was exercising the right to maintain personal relations and direct contact with Travis, § 2(3) does appear to prohibit Mr. McRoberts from removing Travis from the United Kingdom without Ms. Fawcett's consent. Indeed, Mr. McRoberts makes no argument to the contrary. What Mr. McRoberts does contest is Ms. Fawcett's assertion that the prohibition contained in § 2(3) conferred "rights of custody" upon her.

Two of our sister circuits have recently considered this question and agreed with Mr. McRoberts, rejecting arguments very similar to *Ms. Fawcett's*. *Both Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), and *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), involved parents who brought a child to the United States in contravention of a *ne exeat* clause. Ms. Fawcett concedes that the substance of such clauses is indistinguishable from that of § 2(3) of the Children (Scotland) Act. Both the Second and Ninth Circuits held that a *ne exeat* clause does not confer "rights of custody" under the Convention upon a parent who otherwise holds only "rights of access." *Gonzalez*, 311 F.3d at 944; *see also Croll*, 229 F.3d at 135 (same). They reasoned that such clauses grant, "at most, a veto power." *Gonzalez*, 311 F.3d at 949; *see also Croll*, 229 F.3d at 140 (same). Thus, like § 2(3) of the Children (Scotland) Act, these clauses "serve[ ] only to allow a parent with access rights to impose a limitation on the

custodial parent's right to expatriate his child. . . . This hardly amounts to a right of custody." *Gonzalez*, 311 F.3d at 949. We find the reasoning of those courts persuasive and hold that § 2(3) of the Children (Scotland) Act does not confer "rights of custody" on Ms. Fawcett.

B.

The district court also found that "Travis was the subject of rights of custody "attributed to . . . an institution," namely, the Sheriff Court. *Fawcett*, 168 F. Supp. 2d at 603 (quoting Convention, art. 3). In so ruling, the district court misapprehended the nature of the proceedings pending in the Sheriff Court at the time Mr. McRoberts took Travis from Scotland, and therefore erred in its conclusion that the Sheriff Court was exercising "rights of custody" over Travis at the time of Travis's removal.

In reaching the conclusion that the Sheriff Court in Scotland was exercising "rights of custody" over Travis, the district court relied primarily on a case arising from a custody dispute in Ireland, *In re H*, 1999 WL 1319095. In *In re H*, a court initially awarded custody of the child to her mother, and gave only access rights to the child's father. Two years later, the father applied for guardianship, which under Irish law would have conferred upon him equal rights of custody. *Id.* at *4. *While the father's application for guardianship was pending*, the mother left Ireland with the child and the father petitioned under the Convention for return of the child. The House of Lords held that the Irish court "had rights of custody in respect of H. at the time of her removal and that these rights were being exercised *by reason of the pending*

application of her father to be appointed her guardian." *Id.* (emphasis added).

Though we are obviously not bound by a decision from the House of Lords, judicial "opinions of our sister signatories" to the Convention are "entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404, 84 L. Ed. 2d 289, 105 S. Ct. 1338 (1985) (internal quotation marks and citation omitted). Thus, we will accept the holding of *In re H*, and assume, without deciding, that if an "application to the court . . . raises matters of custody within the meaning of the Convention" the court may have "rights of custody," and further that a third party (such as a parent) may assert those rights in a petition for return of child. *In re H*, 1999 WL 1319095, at *3.

Even granting Ms. Fawcett the benefit of these assumptions, however, her argument fails because the application pending in the Sheriff Court *at the time* Mr. McRoberts left Scotland with Travis did not "raise matters of custody within the meaning of the Convention." *Id.* Indeed, Ms. Fawcett conceded at oral argument that she had not been seeking a residence order with respect to Travis at either the February 15 hearing, or in any other application pending before the Sheriff Court, but was rather seeking a court order prohibiting Mr. McRoberts from leaving Scotland.

Ms. Fawcett's application thus did not "raise matters of custody within the meaning of the Convention." *Id.* Even if the Sheriff Court had issued the order Ms. Fawcett had been seeking, the order would not have conferred any greater "rights of custody" on Ms. Fawcett than § 2(3) of the Children (Scotland) Act, or the *ne exeat* clauses discussed in

Gonzalez, 311 F.3d at 944, and *Croll*, 229 F.3d at 135. *See ante* at 13-14. Therefore, the matter pending before the Sheriff Court did not "raise matters of custody within the meaning of the Convention," *In re H*, 1999 WL 1319095, at *3, and the Sheriff Court was not "actually exercising" any "rights of custody" over Travis at the time of his removal from Scotland. Convention, art. 3.

IV.

In sum, the district court erred in holding that Ms. Fawcett or the Sheriff Court had "rights of custody" under the Convention.[6] Accordingly, we reverse and remand to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED

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[6] In light of this holding, we must also hold the district court erred in awarding costs and attorney's fees to Ms. Fawcett.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:01CV0059

[Decided October 11, 2001]

JEAN FAWCETT,	)
Petitioner,	)
	)
v.	)
	)
COLIN MCROBERTS; TAMMY MCROBERTS,	)
Respondents.	)
	)

JUDGES:
JUDGE NORMAN K. MOON.

OPINION

JUDGE NORMAN K. MOON

I. INTRODUCTION

On Tuesday, September 25, 2001 at 11:00 am, this Court convened an emergency ex parte hearing to consider two Petitions filed pursuant to the Convention on the Civil Aspects

of International Child Abduction (Convention, Hague Convention, or Treaty), T.I.A.S. No. 11670, 1988 WL 411501 (Treaty), and the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601, *et seq.* (West 2001). That morning, Petitioner Jean Fawcett ("Ms. Fawcett"), through Counsel, submitted to this Court a Petition for Return of Child to Petitioner and a Petition for Immediate Issuance of Show Cause Order to Respondents.

At the end of the hearing, the Court concluded that Petitioner had presented a prima facie case that her former husband, Colin McRoberts ("Mr. McRoberts"), wrongfully abducted their son, Travis McRoberts ("Travis"), from Scotland to Bedford, Virginia, with the assistance of his current wife, Tammy McRoberts ("Mrs. McRoberts"). Mr. McRoberts and Ms. Fawcett were divorced in 1998.

Following the ex parte hearing, the Court ordered the U.S. Marshals to find Travis, his father, and step-mother, take them into custody, and present them to the Court for an initial hearing scheduled for 3:30 that afternoon.[1] Upon

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[1] 42 U.S.C. § 11604 provides:

> In furtherance of the objectives of article 7(b) and other provisions of the Convention, and subject to the provisions of subsection (b) of this section, any court exercising jurisdiction of an action brought under section 11603(b) of this title may take or cause to be taken measures under Federal or State law, as appropriate, to protect the well-being of the child involved or to prevent the child's further removal or concealment before the final disposition of the petition.

learning that the McRobertses would be appearing pro se, the Court, *sua sponte*, obtained Counsel for the McRobertses for the sole purpose of assisting them with that afternoon's hearing. The Court heard arguments from both Counsel, listened to testimony from Mr. McRoberts, and scheduled another hearing for Tuesday, October 2, 2001, to address the merits of Ms. Fawcett's Petition for Return of Child.[2] The McRobertses chose not to retain Counsel.

In the meantime, the Court ordered the McRobertses, under penalty of Contempt, to remain within its Jurisdiction. The Court further ordered the McRobertses not to remove Travis from its Jurisdiction and to provide him with immediate, reasonable telephone access to his mother. The Bedford County Department of Social Services agreed to assist the Court in ensuring their compliance with the Court's Order by providing ongoing supervision of the Respondents.

At the October 2nd hearing, the Court heard arguments from both Mr. McRoberts (appearing pro se) and Counsel for Ms. Fawcett, received evidence from both parties, and listened to testimony from Mr. McRoberts.

II. FACTS

Travis Colin Patrick McRoberts was born in Scotland on January 3, 1994. His mother, now known as Jean Fawcett,

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[2] *See Zajaczkowski v. Zajaczkowska*, 932 F. Supp. 128 (D. Md. 1996) (treating a petition filed pursuant to the Hague Convention and ICARA as a petition for the writ of habeas corpus, and ordering respondent to show cause as to why child should not be returned).

and his father, Colin McRoberts, were married on September 20, 1986 in Dalmellington, on the upper end of Scotland's Doon Valley.[3] The couple later divorced on November 20, 1998.

The Decree of Divorce required that Melody and Travis live with Mr. McRoberts (under "a Residence Order") and that Ms. Fawcett maintain contact with the children on the weekends (under "a Contact Order"). While Travis and Melody were required to live with Mr. McRoberts, they were also required to have "contact" with Ms. Fawcett on weekends, "from Friday at 6.00 p.m. until Monday at 9.00 a.m." In addition, the court also ordered "contact" between the children and Ms. Fawcett, "for two weeks during the school summer holidays, one week during the October holidays, one week during the Easter holiday and one week at Christmas at times to be agreed between the parties as same fits in with [Mr. McRoberts'] shift pattern."

The months both preceding and following the divorce itself were litigious ones. For more than three years, Travis and Melody's parents waged numerous legal battles before the local sheriff court over who would have custody, visitation, and contact rights concerning Melody and Travis, and who should and should not live in the martial home. Mr. McRoberts has alleged, and Counsel for Ms. Fawcett has not contested, that, prior to the divorce, the sheriff court enjoined Ms. Fawcett from "molesting [Mr. McRoberts] by abusing

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[3] In addition to Travis, Ms. Fawcett and Mr. McRoberts also had a daughter, Melody Jean Fawcett McRoberts, who was born on May 8, 1990.

him verbally, by threatening him and thereby putting him into a state of fear and alarm or distress. . . ." Mr. McRoberts' testimony and a subsequent order of the sheriff court revealed that Travis lived with Mr. McRoberts and Ms. Fawcett's maintained rights of rights of supervised contact with Travis "every second Saturday between 10 a.m. and 5 p.m." A subsequent order of June 23, 2000 appears to have expanded her contact with Travis; it granted:

> To the Defender contact *ad interim* with the child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994 on a four weekly cycle commencing 24 June 2000 as follows:- (Week 1) no contact to take place, (Week 2) residential contact from 3.00 p.m. on Friday until 5.00 p.m. on Sunday, said child to be collected at school by the person on behalf of the Defender, (Week 3) no contact to take place, and (Week 4) contact from 10.00 a.m. until 5.00 p.m. on Saturday; Sists the cause to monitor contact.

In February of this year, Mr. McRoberts and Ms. Fawcett were again embroiled in another court proceeding regarding Travis, including an "oral Motion for interim interdict to prevent [Mr. McRoberts] from removing the children Melody McRoberts and Travis McRoberts . . . from Scotland to the United States of America." On February 15, Mr. McRoberts, himself a police officer, "gave an undertaking" to sheriff court that he would not remove either Travis or his sister from Scotland to the United States.

Mr. McRoberts later broke his word.

At some time between his February 15 undertaking and March 29, 2001, Mr. McRoberts left with Travis and brought him to the United States. The Scottish authorities discovered his flight when Mr. McRoberts failed to appear for a scheduled court hearing on these matters. On March 29, 2001, the sheriff court in Ayr held:

> that [Mr. McRoberts] has (1) unlawfully and wrongly removed the child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994 outwith the jurisdiction of this Court without the express permission of [Ms. Fawcett] in Contravention of her parental rights in terms of Sections 2(3) and 2(6) of the Children Scotland Act 1995; (2) failed to attend the diets of this Court on 26 and 29 March 2001 without an acceptable excuse; (3) removed the child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994, from the jurisdiction of this Court by taking him to the United States of America in breach of a specific undertaking given and recorded in the Interlocutor of 15 February 2001 not to do so pending determination of the present proceedings; and (4) Continues to retain the said child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994 in the United States of America without disclosing his present whereabouts thereby depriving [Ms. Fawcett] of lawful contact with the said child.

The court further found Mr. McRoberts in contempt, fined him 2000, and authorized his arrest.

Sometime later, perhaps in April, Mr. McRoberts moved to Bedford, Virginia with his current wife, Tammy, their son

Tyler, and Travis. The McRobertses now own property in Bedford, and Travis attends the local elementary school. Today, Ms. Fawcett lives with Melody in Ayr; Mr. McRoberts did not bring her to America, he says, because she wanted to remain in Scotland with her mother.

The McRobertses have gone to considerable lengths to conceal Travis not only from the Scottish courts, but also from any contact with his mother, Ms. Fawcett. After fleeing Scotland in a furtive breach of his undertaking, Mr. McRoberts established a post office box in Pennsylvania. Evidently, Mr. McRoberts feared that Ms. Fawcett would discover his and Travis' whereabouts. In a July, 2001 letter to his daughter, Melody, Mr. McRoberts wrote, "We are really worried about what might happen if we give out our address, so I have arranged for a post-box for you to write to us. . . . This is not near where we live, but the letters will get to us."

Until the days following this Court's Order of September 26, 2001, Travis had no contact with his mother since he left Scotland in the spring. He neither had visited her, nor talked with her, nor had any other contact with her -- with the exception of one letter wrote sometime in July. It read, "Dear Mum and Melady, I Love I hope I see you agen. I have 1 faver can you find my big tank and my soldiers plese."

III. JURISDICTION

In 1980, various Nations, including the United States and Great Britain, agreed to the Hague Convention; eight years later, Congress implemented the Treaty by passing ICARA. *See Hague Convention*, 1988 WL 411501, at *1, 42 U.S.C.

§ 11601, *et seq.* According to its findings, Congress enacted the Treaty to establish "legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights." 42 U.S.C. § 11601(a)(4). To achieve these ends, district courts of the United States have been granted original jurisdiction over actions arising under the Hague Convention. 42 U.S.C. § 11603.

Ms. Fawcett's Petition for Return of Child, therefore, is properly before this Court.

IV. ANALYSIS

The Court begins with the plain language of the Treaty and its implementing legislation. *See United States v, Alvarez-Machain*, 504 U.S. 655, 663, 112 S. Ct. 2188, 119 L. Ed. 2d 441 (1992) ("In construing a treaty, as in construing a statute, we first look to its terms to determine its meaning.") Both the Treaty and ICARA require the inquiry into a child abduction claim to be a narrow one. Indeed, Congress provides that courts are empowered "to determine only rights under the Convention and not the merits of any underlying child custody claims." 42 U.S.C. § 11601(b)(4). Similarly, Article 19 of the Treaty cautions that, "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." *See Hague Convention*, 1988 WL 411501 (Treaty), at *5; *see also Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001) (citing *Shalit v. Coppe*, 182 F.3d 1124, 1128 (9th Cir. 1999); *Friedrich v.*

Friedrich, 78 F.3d 1060, 1063-64 (6th Cir. 1996) ("*Friedrich II*")).[4]

Mindful of these obligations, the Court must determine whether Ms. Fawcett can establish, by a preponderance of the evidence, that Travis was "wrongfully removed or retained within the meaning of the Convention." *See* 42 U.S.C. § 11603(e)(1)(A); *Miller*, 240 F.3d at 398. To meet this standard, Ms. Fawcett must prove that (1) Travis was "habitually resident" in Scotland immediately before Mr. McRoberts removed him to the United States; (2) that Travis' removal was in breach of the "rights of custody" of "a person, an institution or any other body," and (3) that those rights "were actually exercised at the time of removal or would have been so exercised in the absence of his removal." *See* Hague Convention, art. 3, 1988 WL 411501, at *2; *see also Miller*, 240 F.3d at 398.

IV. A. 1. Habitual Residence

There should be no doubt that, at the time immediately preceding his removal to the United States, Travis McRoberts was "habitually resident" in Scotland. While the Hague Convention does not itself define what it means to be "habitually resident," the Fourth Circuit and other courts have concluded that the term refers to a child's customary residence prior to his removal. *See Miller*, 240 F.3d at 400 (citing *Friedrich v. Friedrich*, 983 F.2d 1396, 1401 (1993)

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[4] *See also Morris v. Morris*, 55 F. Supp. 2d 1156, 1160 (D. Colo. 1999); *Currier v. Currier*, 845 F. Supp. 916 (D. N.H. 1994); *Meredith v. Meredith*, 759 F. Supp. 1432, 1434 (D. Ariz. 1991).

("*Friedrich I*") (citing *In re Bates*, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989), *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995)). Although this inquiry necessarily proceeds on a case-by-case basis, *see Id.* (citations omitted), it focuses not upon a child's domicile, or legal residence, but where he physically lived for "an amount of time sufficient for acclimitization and which has a 'degree of settled purpose' from the child's perspective." *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

Other than taking occasional vacations with his family, Travis lived his entire life in Scotland prior to the date of his removal. He was born in Scotland on January 3, 1994, and lived at different addresses within the town of Ayr for at least the past five years. Travis attended school in Scotland and was also a subject of numerous Scottish court proceedings, such as Mr. McRoberts and Ms. Fawcett's 1988 divorce, other visitation hearings, and the most recent litigation, during which Mr. McRoberts fled.

Because the evidence clearly demonstrates that Travis continuously resided in Scotland from the time of his birth to the date of his removal, the Court holds that he was "habitually resident" in Scotland for the purposes of the Hague Convention.[5]

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[5] Mr. McRoberts may not argue successfully that Travis should be considered a "habitual resident" of the United States for the purposes of the Convention. In *Miller*, the Fourth Circuit noted that a parent can not create a new habitual residence by wrongfully removing and sequestering a child. *Miller*, 240 F.3d at 400 (citing *Diorinou v. Mezitis*, 237 F.3d 133, 141-42 (2d. Cir. 2001)).

IV. A. 2. Custody Rights and the Exercise Thereof

In order for Ms. Fawcett to prevail, she must satisfy the two remaining elements of Article 3: whether Travis' removal was in breach of "rights of custody" of "a person, an institution or any other body," and whether those rights "were actually exercised at the time of removal or would have been so exercised in the absence of his removal." *See* Hague Convention, art. 3, 1988 WL 411501, at *2; *see also Miller*, 240 F.3d at 398.

To answer these questions, the Court must determine whether these rights existed in the country where the child was "habitually resident" prior to his removal. *See* Hague Convention, art. 3, 1988 WL 411501, at *2. "Rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." *See Id.*, Hague Convention, art. 5, 1988 WL 411501, at *2. These rights may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." *See Id.*, art. 3. The Convention, therefore, broadly defines "rights of custody;" its accompanying report states that "'the law of the child's habitual residence is

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Indeed, the Convention refers to the question of habitual residence in the context prior to "removal or retention," and "any breach of custody or access rights." Hague Convention, art. 3 & 4, 1988 WL 411501, at *2. The Convention mentions it in no other context. Therefore, even if this Court, *arguendo*, were to find that Mr. McRoberts did not *wrongfully* remove Travis, the Convention allows this Court to consider a "removal" -- not only a "wrongful removal" -- when determining what constitutes a habitual residence

invoked in the widest possible sense,' and the sources from which custody rights derive are 'all those upon which a claim can be based within the context of the legal system concerned.'" *Whallon v. Lynn*, 230 F.3d 450, 455 (1st Cir. 2000).[6] Indeed, the rights in the country in which the child is habitually resident may be broader than those in the country where the abduction case is adjudicated,[7] and courts may take notice of these rights "without recourse to the specific procedures for the proof of that law. . . ." *See Id.*, Hague Convention, art. 14, 1988 WL 411501, at *5.

In this case, therefore, the Court must determine whether "a person, an institution or any other body" under Scots law had "rights of custody" relating either "to the care of " Travis, or to his place of residence. The Court holds that both Ms. Fawcett and the sheriff court of Ayr, Scotland had such "rights of custody."

The Children (Scotland) Act, 1995, c. 36 (Scot.) ("the Act" or "Act"), grants parents multiple rights to ensure that

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[6] Quoting Elisa Perez-Vera, Explanatory Report: Hague Conference on Private International Law, P 84, in 3 Acts and Documents of the Fourteenth Session 426, 451-52. Perez-Vera authored the report which "is recognized by the [Hague] Conference as the official history of and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10503 (1986).

[7] See the Court's discussion of the applicability of *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *infra*.

they fulfill their parental responsibilities to their children. Act, § 2. These rights include the right "to have the child living with him *or otherwise to regulate the child's residence*" and "if the child is not living with him, *to maintain personal relations and direct contact with the child on a regular basis.*" Act, § 2(a), (c) (emphasis added). Indeed, the Act undoubtedly echoes the language of the Convention when it provides that "no person shall be entitled to remove a child habitually resident in Scotland without the consent" of "a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him" one of the two rights mentioned immediately above. Act, § 2(3), (6).[8] These

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[8] The relevant portions of the Children (Scotland) Act 1995 read *in toto*:

> 2.-- (1) Subject to section 3(1)(*b*) and (3) of this Act, a parent, in order to enable him to fulfil his parental responsibilities in relation to his child, has the right --
>
> (*a*) to have the child living with him or otherwise to regulate the child's residence . . .
>
> (*c*) if the child is not living with him, to maintain personal relations and direct contact with the child on a regular basis . . . .
>
> (3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United

parental rights arise "by operation of law" (in the words of the Convention) of the U.K. and "relate to the care of the person of the child, and in particular, the right to determine the child's place of residence." As a result, the Children (Scotland) Act 1995 grants "rights of custody" cognizable under the Hague Convention.

Although not one court order produced to this Court has granted Mr. McRoberts "custody" over Travis, the Court assumes, *arguendo*, that the Scottish courts may have granted Mr. McRoberts physical custody of Travis, subject only to limited visits with Ms. Fawcett.[9] Even so, this access, no matter how constrained, is nevertheless among the parental rights given to Ms. Fawcett by the Children (Scotland) Act. This American Court may not look into the merits of an underlying custody or access claim; only a Scottish court may answer the question of whether Mr. McRoberts' physical

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> Kingdom without the consent of a person described in subsection (6) below. . . .
>
> (6) The description of a person referred to in subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right mentioned in paragraph (*a*) or (*c*) of subsection (1) above; except that, where both the child's parents are person so described, the consent required for his removal or retention shall be that of them both.

[9] The court does note, however, that Ms. Fawcett's rights toward Travis constituted considerably more than limited visits.

custody of Travis should foreclose from Ms. Fawcett her parental rights under Scots law,[10] and, therefore, her "rights of custody" under the Convention.[11] In the words of the Hague Convention, Ms. Fawcett is entitled to "the right to determine the child's place of residence." In the similar words of the Children (Scotland) Act, Ms. Fawcett is entitled to "regulate [her] child's residence," as well as to "maintain personal relations and direct contact with" Travis "on a regular basis."[12]

Mr. McRoberts' own actions betray his tacit understanding of Ms. Fawcett's parental rights under § 2(3)

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[10] With respect to Petitions under the Hague Convention, "care must be taken to avoid imposing American legal concepts onto another culture." *See Whallon*, 230 F.3d at 456.

[11] § 11 of the Children (Scotland) Act provides that the sheriff court may issue "an order depriving a person of some or all of his parental responsibilities or parental rights in relation to a child." Neither Mr. McRoberts nor Counsel for Ms. Fawcett has offered any evidence that the sheriff court in Ayr has deprived Ms. Fawcett of her parental rights. In fact, the contempt order of March 29 stated that Travis' abduction was "in Contravention of her parental rights."

[12] Ms. Fawcett also has "parental rights," albeit undefined, with respect to Travis that arise simply as a result of her being his mother. § 3(1)(a) of the Act provides that "a child's mother has parental responsibilities and parental rights in relation to him whether or not she is or has been married to his father. . . ." Since these rights appear in a section of the Act different from § 2, they are likely separate and independent from the rights discussed above, and therefore provide her an alternative basis for relief.

of the Act. On February 15, 2001, Mr. McRoberts undertook to the sheriff in Ayr not to remove Travis to the United States. By doing so, he acceded to the provisions of the Act which forbid one parent from removing a child from Scotland without the consent of the other parent. After having once submitted to the Act's jurisdiction, Mr. McRoberts may not now in good faith deny that the Act applies to Ms. Fawcett's rights of custody.[13]

The Court also believes that Travis was the subject of the rights of custody "attributed to . . . an institution," *see* Hague Convention, art. 3, 1988 WL 411501, at *2, as well as to Ms. Fawcett. During the years following Mr. McRoberts and Ms. Fawcett's 1998 divorce, Travis was the subject of numerous court proceedings concerning his physical custody, visitation rights, and contact with his parents. In fact, at the very time Mr. McRoberts removed Travis from Scotland, he did so both in the midst of one such proceeding and in breach of his specific undertaking not to do so. As a result, the sheriff in Ayr found Mr. McRoberts in contempt, levied a 2000 fine against him, and authorized his arrest. Since the Convention provides that "rights of custody" shall include "rights relating to the care of the person of the child," *See* Hague Convention, art. 5, 1988 WL 411501, at *2, there is no doubt that the sheriff court in Ayr (an "institution"), in convening proceedings concerning Travis' custody, was an "institution" which also possessed "rights of custody" with respect to "the care of" Travis. As already noted, by participating in the

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[13] At the October 2nd Evidentiary Hearing, Mr. McRoberts admitted that were he to return to Scotland, he would be prevented from leaving -- presumably because of the sheriff court contempt order.

sheriff court proceedings and by undertaking not to remove Travis, Mr. McRoberts understood the role of the sheriff court in adjudicating the dispute between himself and his former wife, and can not now deny its interest in this case.

While the question of whether a court has been held to have "rights of custody," appears not to have been addressed in the courts of United States, it has been before the tribunals of our co-signatory Nations. Because the "opinions of our sister signatories [are] entitled to considerable weight," *Air France v. Saks*, 470 U.S. 392, 404, 105 S. Ct. 1338, 84 L. Ed. 2d 289 (1985), this Court turns to the House of Lords, which recently held that a court may possess "rights of custody."

The analogous case of *In Re H. (A Minor)*, [2000] 2 A.C. 291, 1999 WL 1319095 (HL), arose from a dispute in County Cork, in the Republic of Ireland. A father, living in the Republic, petitioned the District Court of Carrigaline for "guardianship [of] and access" to his child. 2 A.C. at 300. The mother (also living in Ireland) and the father both agreed that, pending the district court's decision, the father should be given access to H. "during the daytime on each Saturday and Sunday in the meantime," *Id.*, and the mother "day-to-day" care of H. at her address. *Id.* at 305. Despite this agreement, the mother left Ireland with H. and settled in England. *Id.* at 300. In her absence, the Irish court appointed the father as a guardian and granted him access "to that child from 10 a.m. each Saturday until 6 p.m. each Sunday." *Id.* at 301.

Given the pending nature of the guardianship and access proceedings, the House of Lords concluded that the Irish district court did have "rights of custody" with respect to the

child,[14] and that those rights were breached by H.'s mother when she departed Ireland. Likewise, in the case at bar, questions concerning the rights of custody and access were pending before the sheriff court in Ayr. In addition, the Court assumes *arguendo* that Mr. McRoberts also had "day-to-day care" of Travis at his address when he decided to flee the country. In its contempt order, the Ayr court held that Mr. McRoberts removed Travis "in breach of a specific undertaking not to do so *pending determination of the present proceedings*. . . ." (emphasis added). As the Irish court possessed rights of custody with respect to H., so too does the

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[14] Lord Mackay of Clashfern stated:

> In this case the mother had been awarded custody by consent but as Thorpe L.J. said it was implied in the consent as appears from the terms relating to access that the day-to-day care of the child would be exercised at the mother's address given in the application. Once the father had appointment as guardian he had an equal right with the mother to determine where the child should live and in particular whether the child should be removed from the jurisdiction [of] the courts of Ireland. I do not regard the award of custody by consent in proceedings which were still pending in which active consideration of an application for guardianship by the father was taking place at the time of removal as destructive of the court's power to decide the place of the child's residence. In these circumstances I conclude that the district court of Carrigaline had rights of custody in respect of H. at the time of her removal and that these rights were being exercised by reason of the pending application of her father to be appointed her guardian.

In Re H. (A Minor), 2 A.C. at 305.

sheriff court at Ayr have rights of custody with respect to Travis. Moreover, as a House of Lords decision, *In Re H. (A Minor)* not only assists this Court in interpreting the Hague Convention, it also binds the Scottish court in Ayr, and effectively grants it the authority to maintain "rights of custody" of Travis McRoberts.[15]

* * *

Were Mr. and Mrs. McRoberts represented by Counsel, they most certainly would have invited this Court to follow *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), the facts of which are analogous to the case at bar, and in which the Petitioner was held not to have "rights of custody" of his abducted child, but rather "lesser rights of access." However, because (1) the Fourth Circuit in *Miller* instructs this Court to interpret the Hague Convention in accordance with both its plain language and its purpose, and (2) the facts of this matter are distinguishable from *Croll*, this Court would decline the invitation to apply *Croll* to this case.

In *Croll*, Stephen Croll sought an order compelling his wife, Mei Yee Croll, to return their minor child, Christina, to Hong Kong pursuant to the Hague Convention. *Croll*, 229

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[15] Briefing papers of the British House of Lords state, "The House of Lords is the highest court in the land -- the supreme court of appeal. It acts as the final court on points of law for the whole of the United Kingdom in civil cases, and for England, Wales, and Northern Ireland in criminal cases. Its decisions bind all courts below." *The Judicial Work of the House of Lords*, available at http://www.publications.parliament.uk/pa/ld199697/ldinfo/ld08judg/ld08judg.htm. (last visited Oct. 3, 2001).

F.3d at 134. During or attendant to the divorce proceedings between Mr. and Mrs. Croll, the Hong Kong court issued a custody order which granted Mrs. Croll "'custody, care and control'" of Christina and granted "Mr. Croll a right of 'reasonable access.'" *Id.* at 135 (citation omitted). The custody order also contained a *ne exeat* clause, which directed that Christina "not be removed from Hong Kong until she attained the age of 18 years" without leave of court or consent of the other parent. *Id.* In April, 1999, Mrs. Croll brought Christina to New York with the alleged intention of visiting schools, and eventually decided to keep her there. *Id.*

In ruling against the petitioner, the *Croll* court cited *Black's Law Dictionary, Webster's Third International Dictionary*, and the *Random House Dictionary of the English Language* for the proposition that "custody of a child entails the primary duty and ability to choose and give guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things." *Croll*, 229 F.3d at 138. The court concluded that "custody entails care," and "is something other and more than a negative right or veto," *Id.*, and that "nothing in the Hague Convention suggests that the drafters intended anything other than this ordinary understanding of custody." *Id.* at 139.[16]

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[16] In finding for the Petitioner, the *Croll* court differentiated between "rights of custody" and "rights of access," *Croll*, 229 F.3d at 137, the former of which is discussed above, and both of which are discussed in the Treaty. The Convention defines "rights of access" in Article 5 to "include the right to take a child for a limited period of time to a place other than the child's habitual residence." *See Hague Convention*, 1988 WL 411501, at *2. The Convention also provides that the signatory states "shall take steps

This Court disagrees.

To find a definition of "rights of custody" under the Hague Convention, the Court need search no further than the Hague Convention itself -- a treaty in which the definition of "right of custody" is doubtless broad enough to encompass not only the American notions of custody rights to which the *Croll* court refers, but also the rights of Ms. Fawcett and the Scottish court in this case. The plain language of the Treaty is clear: it provides that "rights of custody" include "rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence." The plain language of the Children (Scotland) Act is also clear: a parent has the right "to regulate the child's residence." As this Court has already demonstrated, under the Convention and Scots law, both Ms. Fawcett and the sheriff court in Ayr possess these rights. Moreover, these rights are not negative nor mere veto rights; they are affirmative grants of custody rights under Scots law. Indeed, by giving his undertaking not to remove Travis from Scotland to the United States, Mr. McRoberts evidenced his own understanding of these rights.

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to remove, as far as possible, all obstacles to the exercise of such rights." See *Id.*, Hague Convention, art. 21, at *5.

The *Croll* court concluded that Stephen Croll's rights "were properly classified as rights of access." 229 F.3d at 143. Since this Court concludes that Ms. Fawcett and the Ayr court do have "rights of custody" of Travis within the meaning of the Convention, it need not address whatever "rights of access" Ms. Fawcett may have.

In *Miller*, the Fourth Circuit noted that the primary purpose of the Hague Convention is "'to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.'" 240 F.3d at 398 (quoting *Friedrich I*, 983 F.2d at 1400). Denying Ms. Fawcett or the sheriff court their lawful custody rights would not only disrupt *pending* proceedings in Scotland, it would also result in a de facto judgment on the merits for Mr. McRoberts. Article 3 of the Convention forbids such an outcome. *See Miller*, 240 F.3d at 398 ("the merits of any underlying custody case are not at issue" (citations omitted).

In addition, to interpret Ms. Fawcett's rights as constituting something less than "rights of custody" would eviscerate another fundamental object of the Convention: "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State." *See* Hague Convention, art. 1, 1988 WL 411501, at *1, *see also Croll*, 229 F.3d at 144, *et seq.* ("In my view, the majority seriously misconceives the legal import of the *neexeat* clause, and in so doing, undermines [this goal]." (Sotomayor, Circuit Judge, dissenting)). The Fourth Circuit echoes this notion, where it notes that "'American courts will normally accord deference to foreign adjudications as a matter of comity,'" and that "comity is at the heart of the Hague Convention." *Miller* 240 F.3d at 400 (quoting *Diorinou*, 237 F.3d 133 at 142-3.)

Finally, the facts of *Croll* are distinguishable from the case at bar. For instance, while the Hong Kong order gives Mrs. Croll "custody, care and control" over her daughter, not one sheriff court order produced by Mr. McRoberts characterizes the relationship between Mr. McRoberts and

Travis (or Melody) as one of "custody" or "custodial." In contrast, the Ayr Divorce Decree of November 20, 1998 states that it is "making a Residence Order in respect of MELODY . . . and TRAVIS . . . requiring that they live with the pursuer." This language certainly falls short of the Hong Kong order's "custody, care, and control" provision.

Furthermore, the Hong Kong court order granting custody to Mrs. Croll was a final, not temporary, order. *Croll*, 229 F.3d at 143. In this case, the litigation concerning Travis was far from final. From the 1998 Divorce Decree to this spring, the sheriff court issued multiple orders altering contact, custody, and visitation parameters concerning Travis. In this case, Mr. McRoberts departed Scotland in the midst of pending proceedings in which the only order issued was not final, but one holding Mr. McRoberts in contempt. Given the continuing nature of the proceedings, the sheriff court still maintained jurisdiction over all parties, and thus "rights of custody" over Travis. In *Croll*, had the Hong Kong order not been final, perhaps the court would have considered the question of whether the Hong Kong court had any rights of custody over Christina.

* * *

Having held that both Ms. Fawcett and the sheriff court possessed "rights of custody" with respect to Travis McRoberts at the time of his removal, this Court now asks whether either one exercised these rights prior to his removal, or would have done so absent his removal. Given the Scottish order of March 29, 2001, there is no doubt that the sheriff court at Ayr was exercising "rights of custody" with respect to Travis prior to his removal -- Mr. McRoberts absconded

with Travis in the midst of the court's proceedings after making a undertaking to the contrary. Similarly, Ms. Fawcett was also exercising her "rights of custody" of Travis. The Scottish court held that Mr. McRoberts removed Travis "in Contravention of her parental rights in terms of Sections 2(3) and 2(6) of the Children Scotland Act 1995." As a party to the ongoing litigation in Ayr, Ms. Fawcett was attempting to exercise her rights pursuant to the Act.

This Court, therefore, concludes that (1) Travis was "habitually resident" in Scotland immediately before Mr. McRoberts removed him to the United States; (2) that Travis' removal was in breach of rights of custody of both his mother, Ms. Fawcett, and the sheriff court in Ayr, and (3) that those rights "were actually exercised at the time of [Travis'] removal."

As a result, this Court holds that, by a preponderance of the evidence, Mr. McRoberts wrongfully and unlawfully removed Travis from Scotland within the meaning of the Hague Convention.

IV. B. Applicable Defenses[17]

Mr. McRoberts is not without potential defense. To defeat Ms. Fawcett's Petition, the Convention requires Mr. McRoberts to establish one of four available defenses set forth in Articles 13b or 20. *See Miller*, 240 F.3d at 398-99. In order to prevail, Mr. McRoberts must demonstrate, by clear and convincing evidence, that (1) there was a grave risk that Travis' return to Scotland would expose him to physical or psychological harm or otherwise place him in an intolerable situation, *see* Hague Convention, art. 13b, 1988 WL 411501, at *5, or (2) the return of Travis to Scotland would not be permitted by the fundamental principles of the United States "relating to the protection of human rights and fundamental freedoms[,]" *Id.*, art. 20, 1988 WL 411501, at *6. *See also Miller*, 240 F.3d at 398-99. Alternatively, Mr. McRoberts could prevail should he establish, by a preponderance of the evidence, that this action was not commenced within one year of the abduction, *and* that the children were now well-settled in Virginia, *see* Hague Convention, art. 12, 1988 WL 411501, at *5, or that Ms. Fawcett "was not actually exercising the custody rights at the time of removal . . . *or* had consented to or subsequently acquiesced in the

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[17] While "'courts retain the discretion to order return even if one of the exceptions is proven,'" *Miller*, 240 F.3d at 398-99 (quoting *Feder*, 63 F.3d at 226 (citing Pub. Notice 957, 51 Fed.Reg. 10,494, 10509 (1986)), this Court will nevertheless consider the merits of each of Mr. McRoberts' potential defenses. *See also* Hague Convention, art. 18, 1988 WL 411501, at *5 ("The provisions of this Chapter [entitled Return of Children] do not limit the power of a judicial or administrative authority to order the return of the child at any time.")

removal[,]" Hague Convention, art. 13a, 1988 WL 411501, at *4 (emphasis added).

Mindful that these defenses should be construed narrowly, *see Miller*, 240 F.3d at 402 (citing *Friedrich II*, 78 F.3d at 1067), the Court shall now address each one *seriatim*.

Mr. McRoberts must establish the first defense of "grave risk" by clear and convincing evidence. During the evidentiary hearing, Mr. McRoberts offered testimony about the litigation surrounding both the dissolution of his marriage to Ms. Fawcett and questions of Travis' custody. Notwithstanding his egregious lack of candor with the sheriff court in Ayr on February 15, 2001, this Court nonetheless accepts Mr. McRoberts' contention that Ms. Fawcett's fitness to rear her children may be an important question. The Court does note that Ms. Fawcett's access to her son was circumscribed by the Ayr court. The Court further recalls the Order that Ms. Fawcett had to be enjoined from "molesting [Mr. McRoberts] by abusing him verbally, by threatening him and thereby putting him into a state of fear and alarm or distress and by using violence towards him. . . ."

Nevertheless, the duty of this Court is clear: it may not look into the merits of the underlying child custody claim. As the Sixth Circuit observed, and the Fourth Circuit agreed, *see Miller* 240 F.3d at 402:

> In thinking about these problems, we acknowledge that courts in the abducted- from country are as ready and able as we to protect children. If return to a country, or to the custody of a parent in that country, is dangerous, we can expect that country's courts to

> respond accordingly. . . . When we trust the court system in the abducted-from country, the vast majority of the claims of harm -- those that do not rise to the level of gravity required by the Convention -- evaporate.

(quoting *Friedrich II*, 78 F.3d at 1068 (internal citation omitted)). Given the Scottish sheriff court's experience in matters of family law -- let alone its three-year involvement with Mr. McRoberts, Ms. Fawcett, and Travis -- Travis most certainly does not face "a grave risk of harm" were he to be returned to Great Britain. Scotland, like Virginia, is home to various social service and child welfare agencies which will work with the Scottish courts to safeguard the best interests of Travis while protecting the parental rights of both Ms. Fawcett and Mr. McRoberts. This Court concludes that Travis would not face a "grave risk" of physical or psychological harm, or be placed in an "intolerable situation." For the same reasons, the Court also concludes that Travis' return to Scotland would not offend fundamental principles of human rights and freedoms. Mr. McRoberts, therefore, can not establish the first two defenses.

Likewise, Mr. McRoberts can not meet the requirements of the second two defenses. First, Ms. Fawcett complied with the one-year statute of limitations. *See* Hague Convention, art. 12, 1988 WL 411501, at *4. Ms. Fawcett filed her Petitions in this Court on September 25, 2001, well within a year of February 15, 2001, the earliest possible date of his removal from Scotland. Second, this Court has already established that Ms. Fawcett "was . . . exercising her custody rights at the time of removal" and had never "consented to or subsequently acquiesced in his removal."

The Court, therefore, holds that Mr. McRoberts has no defense to removing Travis from Scotland.

V. CONCLUSION

This Court does not dispute Mr. McRoberts' contention that he is providing a nurturing environment for Travis in Bedford, Virginia. It is evident that Mr. McRoberts loves his son and wishes to provide for his well-being. Nevertheless, no matter how sincere his intentions may be, Mr. McRoberts may not pursue them in defiance of international, Scottish, and American law.

The courts of Scotland will provide the rightful and most efficient venue to ensure the best interests of Travis while safeguarding the rights of both of his parents.

Because Travis McRoberts was unlawfully and wrongfully removed from Scotland to the United States within the meaning of the Hague Convention, Ms. Fawcett's Petition for Return of Child to Petitioner shall be, and hereby is, GRANTED.

VI. COSTS

Congress has mandated that Courts which order the return of a child pursuant to a Hague Convention petition shall order the respondent to pay the necessary expenses incurred by or on behalf of the petitioner -- unless the respondent can establish that such order would be "clearly inappropriate." 42 U.S.C. § 11607(b)(3). These costs include: "court costs, legal fees, foster home or other care during the course of

proceedings in the action, and transportation costs related to the return of the child." *Id.*

Because this Court has concluded that Travis McRoberts has been wrongfully removed from Scotland within the meaning of the Convention, the Court hereby ORDERS Petitioner to submit a bill of costs and fees for the instant action no later than 10 days from the issuance of this ORDER. The Court also reserves jurisdiction over further expenses as Respondents may submit.

An ORDER implementing this OPINION is attached hereto.

/s/ _____
U.S. District Judge

ENTERED: 10-11-01

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

CIVIL ACTION NO. 6:01CV0059

[Decided October 11, 2001]

JEAN FAWCETT,	)
Petitioner,	)
	)
v.	)
	)
COLIN MCROBERTS; TAMMY MCROBERTS,	)
Respondents.	)
	)

JUDGES:
JUDGE NORMAN K. MOON.

ORDER

JUDGE NORMAN K. MOON

On September 25, 2001, Jean Fawcett, through Counsel, submitted a Petition for Return of Child to Petitioner. For the reasons stated in the attached OPINION, Ms. Fawcett's Petition shall be, and hereby is, GRANTED. With the kind agreement, cooperation, and assistance of the Bedford County Department of Social Services and the appropriate Scottish child welfare agency, Travis McRoberts shall be taken into custody and returned to the jurisdiction of the sheriff court, Ayr, Scotland, FORTHWITH.

In addition, because this Court has concluded that Travis McRoberts has been wrongfully removed from Scotland within the meaning of the Convention, the Court hereby ORDERS Petitioner to submit a bill of costs and fees for the instant action no later than 10 days from the issuance of this ORDER.

It is so ORDERED.

The Clerk of the Court is hereby directed to send certified copies of this ORDER and OPINION attached hereto to all Counsel of record, as well as to: (a) the Bedford County Department of Social Services, (b) Mr. John Overstreet, Bedford County Attorney, and (c) the clerk of the sheriff court of Ayr, Scotland, United Kingdom.

/s/ _____
U.S. District Judge

ENTERED: 10-11-01

(4)

Supreme Court, U.S.
FILED
OCT 3 1 2003
OFFICE OF THE CLERK

No. 03-261

In the Supreme Court of the United States

JEAN FAWCETT,

Petitioner,

v.

COLIN MCROBERTS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

STEPHEN J. CULLEN
Counsel of Record

MILES & STOCKBRIDGE P.C.
600 WASHINGTON AVENUE
TOWSON, MD 21204-3965
(410) 821-6565

JAMISON G. WHITE
Of Counsel

MILES & STOCKBRIDGE P.C.
10 LIGHT STREET
BALTIMORE, MD 21202-1487
(410) 727-6464

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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REPLY

Respondents do not dispute the key points in the Petition for Writ of Certiorari. Instead, they seek to divert the Court's attention with a series of misstatements and invalid arguments.

1. Respondents do not challenge Petitioner's key points: an overwhelming majority of courts interpret "rights of custody" under the Hague Convention to include a right to determine whether the child remains in the country of habitual residence, *see* Petition ("Pet.") 9-26; and Petitioner had had such a right (together with other significant rights) under Scots law, *see id.* at 16. *See also* Scottish Ministers Brief 10-19. Indeed, Respondents acknowledge that the issues presented by the Petition are "compelling." Br. in Opp. 6, 11.

2. Respondents contend, however, that "the record below does not contain evidence of an order prohibiting Mr. McRoberts from removing Travis from Scotland," and therefore "the question advanced . . . is not supported by this record or this decision." Br. in Opp. 5. This contention is utterly unpersuasive, for two reasons.

First, no "pre-removal order" is required under the Hague Convention:

> The rights of custody . . . may arise in particular *by operation of law* or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Convention, art. 3 (emphasis added). Thus, it is clear that rights of custody may arise under the Convention without any judicial order, by virtue of a statute or other source of law. It is also undisputed that the Children (Scotland) Act 1995 provides, "by operation of law," that removal of a child is prohibited without the consent of both parents. *See* Scottish Ministers Br. 5.

Second, Mr. McRoberts avoided the entry of a pre-removal order in this case by giving an undertaking to the Ayr Sheriff Court that he would not remove Travis from Scotland. *See* Pet. 6. Furthermore, the Sheriff Court entered a post-removal order declaring that the removal of Travis constituted a violation of both the Children (Scotland) Act 1995 and Mr. McRoberts' express undertaking. *See id.* The fact that there was not, in addition to all of these measures, an express pre-removal order by the Scottish court cannot possibly distinguish this case from other cases involving *ne exeat* provisions. The Court of Appeals did not even suggest any such distinction. *See* Pet. App. 24a.

3. Respondents other major contention is that Petitioner or the Scottish Government should have sought a determination under Article 15 of the Hague Convention that Travis's removal was wrongful, and their failure to do so should be regarded as a waiver of any right to object to the Court of Appeals' decision. Br. in Opp. 3-4, 10. This line of argument entirely misconstrues the clear language of Article 15, which provides that the "judicial and administrative authorities of a Contracting State" (here, the United States) may, in their discretion, "request that the applicant obtain from the authorities of the State of habitual residence of the child a decision or other determination that the removal or retention was wrongful . . . ." Convention,

art. 15. Article 15 allowed, but did not require, the U.S. District Court to request such a determination from the appropriate Scottish authorities. Petitioner was neither obligated nor permitted to make such a request unilaterally.

The suggestion that the Petitioner declined to pursue an Article 15 request for some strategic purpose is completely at odds with her extensive efforts to have Travis returned to Scotland, her own sworn application, the orders of the Ayr Sheriff Court holding Mr. McRoberts in contempt and in violation of the Children (Scotland) Act 1995 and his own express undertaking to the Scottish court that he would never remove the child from Scotland. The District Court no doubt concluded that such evidence sufficiently established the wrongfulness of the child's removal from Scotland and that no Article 15 determination from Scotland was necessary.

The District Court's action is in accord with the generally accepted view that the summary return mechanism would be unnecessarily delayed if courts were to seek an Article 15 statement in every Hague Convention case. Just such a possibility was a particular concern of delegates at the XIVth Session. *See Procès-verbal* No. 11, at 325, *reprinted in* III Actes et Documents de la Quatorzieme Session, Child Abduction (1982).[1]

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[1] Petitioner has found only five cases, among the many reported cases in the U.S. concerning the Hague Convention, that even mention Article 15 statements, and the Article 15 statement did not determine the outcome in any of those cases. *See Silverman v. Silverman*, 267 F.3d 788, 791 (8th Cir. 2001); *Ohlander v. Larson*, 14 F.3d 1531, 1545 (10th Cir. 1997); *Armiliato v. Zaric-Armiliato*, 169 F. Supp. 2d. 230, 235 (S.D.N.Y. 2001); *Norden-Powers v. Beveridge*, 125 F. Supp. 2d 634, 636-637 (E.D.N.Y. 2000); *Feder v. Feder*, 866 F. Supp. 860, 866 (E.D. Pa. 1994).

In short, Respondents' Article 15 argument is clearly invalid, and their heavy reliance on this argument simply underscores their effort to avoid the core issues in this case.

4. Respondents incorrectly assert that Petitioner is seeking to extend the right of return to cases involving only "the breach of rights of access." Br. in Opp. 1. This simply mischaracterizes Petitioner's argument. It is common ground that the Convention provides a right of return only if the child is removed in breach of "rights of custody." The issue is whether the right to veto the child's removal from the country of habitual residence falls within the broad definition of "custody rights" found in Article 5 of the Convention. Many Contracting States have considered this question and an overwhelming majority have answered it in the affirmative. *See* Pet. 25-26 n.5.

5. Respondents misunderstand the essence of the Convention in advancing the argument that Ms. Fawcett did not possess custody rights because she could not determine the child's residence within Scotland. In fact, whether or not it was ever conceded that the mother did not have the right to determine the child's residence within Scotland is irrelevant. It is the Petitioner's right to veto Travis' removal from Scotland and establish residence in another country that is paramount under the Convention.

6. Finally, Respondents' effort to side-step a circuit conflict on the mootness issue is unconvincing. Contrary to Respondents' assertion (Br. in Opp. 7), the Court of Appeals did not view the Eleventh Circuit's decision in *Bekier v. Bekier*, 248 F.3d 1051 (11th Cir. 2001), as distinguishable. The Court of Appeals distinguished the cases on which *Bekier* relied, but not *Bekier* itself. *See* Pet. App. 14a-15a & n.2. Respondents suggest three grounds for distinguishing *Bekier*:

Respondents in this case were not represented by counsel; the issue in this case is "capable of repetition yet evading review"; and Respondents in this case were ordered to pay Petitioner's attorneys' fees. Br. in Opp. 8-9. As to the first point, Respondents were in fact represented by counsel at the hearing before the District Court, and in any event it is difficult to see how the presence or absence of counsel can breathe life into an otherwise moot controversy. As to the second point (which, if true, would apply equally to *Bekier*), the issue is not one that will evade review in future cases, because parties in Respondents' position are always free to seek a stay pending appeal (and, if necessary, to seek appellate review of the denial of a stay). Moreover, this is not a class action, and it is not clear that Respondents are likely to find themselves in the same situation again. *See Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (in the absence of a class action, there must be a likelihood that the same controversy will recur involving the same complaining party); *Weinstein v. Bradford*, 432 U.S. 147, 149 (1975) (same). And as to the third point, even assuming there was no attorneys' fee award in *Bekier* (perhaps a doubtful assumption in view of Respondents' own admission a fee award is "arguably mandatory under the International Child Abduction Remedies Act)," the Court of Appeals plainly did not limit itself to deciding the attorneys' fees issue. Br. in Opp. 8. To the contrary, the Court of Appeals consigned that issue to a footnote; the text of its opinion discusses at length the wider scope of its decision. Pet. App. 18a-20a & n.3 Given the importance of the mootness issue, its recurring nature, and the Solicitor General's prior suggestion to this Court that the return of a child under the Convention renders the case moot, *see* Pet 30, it also merits the Court's review.

CONCLUSION

Every pronouncement and order from the Ayr Sheriff Court and every aspect of the relevant Scots statutory law confirm that the Court of Appeals chose to ignore the valid and undisputed Scottish orders and condone the unilateral and unlawful removal and concealment of the Petitioner's child in this country. Nothing in the Respondents' arguments explain this erroneous interpretation of international law. Nothing in the Respondents' arguments even attempt to explain why the Court of Appeals can take a position with respect to *ne exeat* statutory restrictions that is not only contrary to fundamental rights under Scots law but contrary to the overwhelming international precedent. For these compelling reasons, certiorari should be granted in the present case.

Respectfully submitted,

STEPHEN J. CULLEN
Counsel of Record
Miles & Stockbridge P.C.
600 Washington Avenue, Suite 300
Towson, Maryland 21204
(410) 821-6565

JAMISON G. WHITE
Of Counsel
Miles & Stockbridge P.C.
10 Light Street
Baltimore, Maryland 21202
(410) 727-6464

Counsel for Petitioner,
Jean Fawcett

MOTION FILED

SEP 19 2003

(2)

No. 03-261

IN THE

Supreme Court of the United States

JEAN FAWCETT,

Petitioner,

v.

COLIN McROBERTS AND TAMMY McROBERTS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE SCOTTISH MINISTERS CONSTITUTED UNDER THE SCOTLAND ACT 1998 AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Robert A. Long
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Avenue, NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for the Scottish Ministers

September 19, 2003

31 pp

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MOTION OF THE SCOTTISH MINISTERS CONSTITUTED UNDER THE SCOTLAND ACT 1998 FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, the Scottish Ministers constituted under the Scotland Act 1998 hereby move for leave to file the accompanying brief as *amici curiae* in support of petitioner.

The Scottish Ministers are responsible for the administration of functions devolved from the Government of the United Kingdom under the Scotland Act 1998. The Scottish Ministers comprise the First Minister, the Lord Advocate, the Solicitor General, and such other Ministers as are from time to time appointed under Section 47 of that Act. The functions devolved on the Scottish Ministers include the administration in Scotland of the Hague Convention on the Civil Aspects of

International Child Abduction.[1] The Scottish Ministers therefore have an interest in the correct interpretation of the Convention, and in securing the prompt return of children unlawfully removed from Scotland.

Petitioner Jean Fawcett and Respondent Colin McRoberts were married and subsequently divorced in Scotland, and their child Travis McRoberts was born and lived in Scotland. Mr. McRoberts removed Travis from Scotland to the United States in violation of Ms. Fawcett's rights under the Children (Scotland) Act 1995, and in breach of an express undertaking given by Mr. McRoberts to the Sheriff Court of Ayr, Scotland.

The Sheriff Court promptly entered an order finding that the removal violated Mr. McRoberts's undertaking and Ms. Fawcett's statutory rights, holding Mr. McRoberts in contempt of court, authorizing his arrest, and imposing a substantial fine. The U.S. court of appeals nevertheless has held that, at the time of the removal, neither Ms. Fawcett nor the Sheriff Court had "rights of custody" within the meaning of the Convention.

The Scottish Ministers submit that the decision of the court of appeals is in error, and poses an obstacle to the proper operation of the Hague Convention between Scotland and the United States, and more generally, given the wide use of statutory and judicially ordered non-removal ("*ne exeat*") clauses to regulate post-separation and divorce arrangements and to ensure the jurisdictional primacy of the state of habitual residence in matters affecting the children concerned. The Government of the United Kingdom supports the filing of this brief on behalf of the Scottish Ministers.

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[1] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

This motion is necessary because Respondent's counsel has refused to give a definite answer to written and telephonic requests for consent to the filing of this brief.

Respectfully submitted,

Robert A. Long
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for the Scottish Ministers

QUESTION PRESENTED

The Scottish Ministers will address the following question:

Whether the removal of a child from Scotland to the United States breached "rights of custody" within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction, where: (1) the removal violated an express undertaking given by the child's father to the Sheriff Court of Ayr, Scotland, not to remove the child to the United States pending further judicial proceedings; and (2) the Sheriff Court entered an order holding that the removal was in breach of both the father's undertaking to the court and the mother's rights under the Children (Scotland) Act 1995.

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INTEREST OF THE AMICI CURIAE

The Scottish Ministers are responsible for the administration of functions devolved from the Government of the United Kingdom under the Scotland Act 1998.[1] The Scottish Ministers comprise the First Minister, the Lord Advocate, the Solicitor General, and such other Ministers as are from time to time appointed under Section 47 of that Act. The functions devolved on the Scottish Ministers include administration in Scotland of the Hague Convention on the Civil Aspects of International Child Abduction (hereinafter "Hague Convention" or "Convention").[2] The Scottish Ministers therefore have an interest in the correct interpretation of the Convention, and in securing the prompt return of children unlawfully removed from Scotland.

Respondent Colin McRoberts removed his son Travis McRoberts from Scotland to the United States in violation of Ms. Fawcett's rights under the Children (Scotland) Act 1995, and in breach of the father's express undertaking recorded by the Sheriff Court of Ayr, Scotland. The Sheriff Court entered an order finding that the removal violated the undertaking and Ms. Fawcett's statutory rights, holding Mr. McRoberts in contempt of court, authorizing his arrest, and imposing a substantial fine. The U.S. court of appeals nevertheless has held that, at the time of the removal, neither Ms. Fawcett nor the Sheriff Court had "rights of custody" within the meaning of the Convention.

The Scottish Ministers submit that the decision of the court of appeals is in error, and poses an obstacle to the proper operation of the Hague Convention not only between Scotland and the United States, but also more generally, given the wide use of statutory and judicially-ordered non-removal ("*ne exeat*") clauses to regulate post-separation and divorce arrangements and to ensure

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[1] Pursuant to Supreme Court Rule 37.6, counsel for the *amici* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici* or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

the jurisdictional primacy of the state of habitual residence in matters affecting the children concerned. The Government of the United Kingdom supports the filing of this brief on behalf of the Scottish Ministers.

STATEMENT

1. The Hague Convention. The Convention is intended to "protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access."[3] Seventy-four countries, including the United Kingdom and the United States, have ratified or acceded to the Convention since it was finalized in 1980.[4] The U.S. Congress enacted legislation implementing the Convention in 1988.[5]

The Convention requires the prompt return of children who have been wrongfully removed from or retained in a contracting state. In ruling on a petition for return under the Convention, a court is not authorized to decide any underlying custody issues on the merits.[6] If the child has been wrongfully removed, custody issues are resolved by authorities in the state of the child's habitual residence.[7]

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[3] Convention, Preamble.

[4] *See* Hague Conference on Private International Law, Status Sheet Convention # 28, Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, *available at* http://www.hcch.net/e/status/abdshte.html.

[5] *See* International Child Abduction Remedies Act ("ICARA"), Pub. L. No. 100-300, 102 Stat. 437 (1988), codified as amended at 42 U.S.C. §§ 11601-10.

[6] *See* Convention Art. 19; 42 U.S.C. § 11601(b)(4).

[7] In limited circumstances, not applicable here, a court is not required to order the return of the child under the Convention, *e.g.*, if a request for return is not made within one year and the child is settled in its new environment, Art. 12; if there is a grave risk that return "would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation," Art. 13(b); or if return "would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms," Art. 20.

The meaning of the phrase "rights of custody" in the Convention is of controlling importance, because it is the existence of "rights of custody" that triggers the right of return. The Convention requires that the child be returned when there is a "breach of rights of custody attributed to a person, an institution, or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention." Art. 3. The Convention further provides: "For the purposes of this Convention . . . 'rights of custody' shall include rights relating to the care of the person of the child *and, in particular, the right to determine the child's place of residence.*" Art. 5(a) (emphasis added). In addition, the Convention provides that "rights of custody" may arise "by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Art. 3. If a removal breaches only "rights of access," but not "rights of custody," the Convention does not provide for the return of the child to the country of habitual residence.[8]

The Explanatory Report that accompanied the Convention indicates that the phrase "rights of custody" is to be interpreted broadly. Specifically, the Report states that "the intention is to protect all the ways in which custody of children can be exercised," that "the law of the child's habitual residence is invoked in the widest possible sense," that "the sources from which the custody rights which it is sought to protect derive, are all those upon which a claim can be based within the context of the legal system concerned," and that it is appropriate to adopt "a flexible interpretation of the terms used, which allows the greatest possible number of cases to be brought into consideration."[9]

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[8] The Convention provides that "'rights of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence." Art. 5(b).

[9] Elisa Pérez-Vera, Explanatory Report on the Child Abduction Convention, *reprinted in* III *Actes et Documents de la Quatorzieme Session, Child Abduction,* ¶ 67 (1981).

The drafting history (*travaux preparatoires*) also sheds light on the specific question whether a right to prevent the removal of the child from the state of habitual residence gives rise to a "right[] of custody" within the meaning of the Convention.[10] During the final diplomatic conference on the Convention, Mr. Leal of Canada stated that if "[c]ustody is given to the mother, but the order provides that the child cannot go out of the jurisdiction without the father's consent," and "the mother nevertheless leaves the jurisdiction without such consent," then "that constitutes wrongful removal." Mr. Van Boeschoten of the Netherlands agreed that under the terms of Article 3, the child would have to be returned immediately. Mr. Eekelaar, observer for the British Commonwealth, likewise expressed his view that a parent with a right to be consulted about relocation would be covered under the definition of "rights of custody" in Article 5.[11]

The issue presented here has also been discussed at meetings of the contracting states to review the operation of the Convention; there it has been concluded that an order prohibiting a parent from removing the child from the jurisdiction without the consent of the other parent or the court (a "*ne exeat*" order) gives rise to "rights of custody" within the meaning of the Convention.[12]

2. The Law Of Scotland. The Children (Scotland) Act 1995 (hereinafter "Act") replaced the terminology of "rights of

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[10] "Because a treaty ratified by the United States is not only the law of this land . . . but also an agreement among sovereign powers, [U.S. courts] have traditionally considered as aids to its interpretation the negotiating and drafting history (travaux preparatoires) and the postratification understanding of the contracting parties." *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996).

[11] Hague Conference on Private International Law, Acts and Documents, III *Actes et Documents de la Quatorzieme Session,* Oct. 6-25, 1980, at 266 (quoted in Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 Tex. Int'l L.J. 41, 46 n.34 (Winter 2003)).

[12] *See* Report of the Second Special Commission Meeting to Review the Operation of the Hague Convention on the Civil Aspects of International Child Abduction (Jan. 18-21, 1993), *reprinted in* 33 I.L.M. 225, 233-34 (1994).

custody" and "rights of access" with an enumeration of parental rights and responsibilities. *See* Kenneth McK Norrie, *Children (Scotland) Act 1995*, at 6 (rev. ed. 1998). Section 1 of the Act provides that a parent has the responsibilities, *inter alia*, "to safeguard and promote the child's health, development and welfare"; to provide the child with "guidance" and "direction"; and "to maintain personal relations and direct contact with the child." Act § 1(1). Section 2 of the Act provides that a parent, in order to fulfill these responsibilities, has the rights, *inter alia*, "to have the child living with him or otherwise to regulate the child's residence"; "to control, direct or guide . . . the child's upbringing"; and "to maintain personal relations and direct contact with the child on a regular basis." Act § 2(1).

Subsection 2(3) of the Act expressly provides:

> (3) Without prejudice to any court order, no person shall be entitled to remove a child habitually resident in Scotland from, or to retain any such child outwith, the United Kingdom without the consent of a person described in subsection (6) below.

In turn, Subsection 2(6) provides:

> (6) The description of a person referred to in Subsection (3) above is a person (whether or not a parent of the child) who for the time being has and is exercising in relation to him a right [to regulate the child's residence, or to maintain personal relations and direct contact with the child]; except that, where both the child's parents are persons so described, the consent required for his removal or retention shall be that of them both.

Subsections (3) and (6) of the Act are intended to "make clear that removal by one parent with parental responsibilities and parental rights without the consent of the other parent with parental responsibilities and parental rights amounts to 'wrongful removal' for the purposes of the Hague Convention." Norrie, *supra*, at 12.

Section 11(2) of the Act provides that a Scottish court may issue "an order depriving a person of some or all of his parental

responsibilities or parental rights in relation to a child." Section 11(11) further provides, however, that such an order shall have the effect of depriving a person of a parental right or responsibility "only in so far as the order expressly so provides and only to the extent necessary to give effect to the order." In this respect, Section 11 of the Act

> creates an important change in the law. The old custody orders were assumed . . . to remove any rights of custody which existed in the person who was not awarded custody, even when this was not made plain in the court decree . . . . It is now required that for that result to follow the court must make a specific decision to that effect (taking account of the overarching principle in subs. 7) and the effect must be spelt out in the decree.

Norrie, *supra*, at 32. Under the Act, "[i]f one parent wishes to be in sole control of the child's upbringing with sole decision-making powers, then she or he must apply for the removal of the other's parental responsibilities and parental rights" under the Act and "the onus will be on the applicant" to show "why the other [parent] should be denied responsibilities and rights." *Id.* at 33-34. "If a court denies a parent the right to regulate the child's residence . . . and nothing more, that parent remains subject to all the responsibilities . . . and possessed of all the other rights" set out in Sections 1 and 2 of the Act (and summarized above). *Id.* at 38-39.

3. The Facts Of This Case. Petitioner and Respondent were married in Scotland in 1986. Their child, Travis Colin Patrick McRoberts, was born in Scotland in 1994. "Other than taking occasional vacations with his family, Travis lived his entire life in Scotland prior to the date of his removal." Pet. App. 37a.

In 1998, the Sheriff Court of Ayr, Scotland granted the couple a decree of divorce. Pursuant to the terms of a "Residence Order" and a "Contact Order" issued by the Sheriff Court, Travis lived with his father but had contact with his mother. The court's orders do not extinguish Ms. Fawcett's other parental rights and responsibilities.

In February 2001, Ms. Fawcett became concerned that Mr. McRoberts and his new wife intended to remove Travis to the United States. Ms. Fawcett made an "oral Motion for interim interdict to prevent [Mr. McRoberts] from removing . . . Travis McRoberts . . . from Scotland to the United States of America." On February 15, the Sheriff Court "refused [the] same as Mr. McRoberts . . . gave an undertaking to the Court that he will not remove [Travis] from Scotland to the United States," and adjourned the proceeding "for further evidence to be led." Pet. App. 9a.

Shortly thereafter, Mr. McRoberts removed Travis to Bedford, Virginia, without permission from either the Sheriff Court or Ms. Fawcett. Once in Virginia, Mr. McRoberts took steps to conceal Travis's location from the Sheriff Court and Ms. Fawcett. Pet. App. 9a, 34a.

In March 2001, the Ayr Sheriff Court entered an order finding Mr. McRoberts in contempt of court, authorizing his arrest, and holding that he has

> unlawfully and wrongfully removed the child TRAVIS COLIN PATRICK McROBERTS, born 3 January 1994 outwith the jurisdiction of this Court without the express permission of [Ms. Fawcett] in Contravention of her parental rights in terms of Sections 2(3) and 2(6) of the Children Scotland Act of 1995; . . . [and] . . . in breach of a specific undertaking given and recorded in the Interlocutor of 15 February 2001 not to do so pending determination of the present proceedings.

Pet. App. 33a.

In April 2001, the Scottish Executive Justice Department submitted a request for the return of Travis McRoberts to the National Center for Missing and Exploited Children. C.A. App. 19-24. The request for return states that Ms. Fawcett "raised court proceedings with a view to varying the residence order in her favour," *id.* at 19; that Travis McRoberts "is the subject of the ongoing court proceedings at Ayr Sheriff Court which confers rights of custody on the mother who has a contact order," *id.* at 23,

and that the civil proceedings in progress at the time of the removal include an "action seeking residence of child at Ayr Sheriff Court," *id.*

4. The Decisions Of The Lower U.S. Courts. Ms. Fawcett filed a petition in the United States District Court for the Western District of Virginia, seeking the return of Travis pursuant to the Convention. Following a hearing, the district court held that Travis had been wrongfully removed from Scotland and ordered his return. The district court held that both Ms. Fawcett and the Sheriff Court have "rights of custody" under Scots law that are enforceable under the Convention. Pet. App. 38a-50a.

The district court recognized that, under Scots law, Ms. Fawcett is entitled to regulate her child's residence and to maintain personal relations and direct contact with him on a regular basis. *Id.* at 39a-40a. The district court emphasized that, although a Scottish court may issue an order depriving a person of some or all of his parental rights, in this case the Sheriff Court specifically found that Travis's removal was "in Contravention of her parental rights" under Sections 2(3) and 2(6) of the Children (Scotland) Act 1995. *Id.* at 42a n.11.

The district court further held that the Ayr Sheriff Court has "rights of custody" for purposes of the Convention. The district court found that Travis had been the subject of numerous proceedings before that court concerning his physical custody, visitation rights, and contact with his parents, and that his removal to the United States occurred "in the midst of one such proceeding" and in violation of Respondent's undertaking to the Sheriff Court. *Id.* at 43a.

The court of appeals reversed.[13] The court recognized that Section 2 of the Children (Scotland) Act 1995 provides Ms. Fawcett with a right "to regulate the child's residence," Pet. App. 21a, but noted that this right had been terminated, with respect to

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[13] Initially, the court of appeals held that this case is not moot as a result of Travis's return to Scotland. Pet. App. 11a-19a. The Scottish Ministers take no position on the mootness question.

the right to determine Travis's residence *within* Scotland, by order of the Sheriff Court. *Id.* at 21a-22a. The court of appeals acknowledged that the divorce decree "permitted Ms. Fawcett to retain other parental rights," *id.* at 23a n.5, but it relied on commentary to an opinion of the Scottish Court of Session for the proposition that "a parent 'clearly loses [her] "rights of custody" [under the Convention] if the other parent is awarded a residence order,'" *id.* at 22a (quoting commentary to *Donofrio v. Burrell*, 2000 S.C.L.R. 465, at 476 (1999)).

The court of appeals also acknowledged that Section 2(3) of the Act "does appear to prohibit Mr. McRoberts from removing Travis from the United Kingdom without Ms. Fawcett's consent." Pet. App. 24a. Indeed, the court noted, "Mr. McRoberts makes no argument to the contrary." *Id.* Citing decisions of the Second and Ninth Circuits, however, the court of appeals held that such "*ne exeat*" provisions do not confer "rights of custody" within the meaning of the Convention. Pet. App. 24a-25a (citing *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002), and *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001)).

The court of appeals further concluded that the district court had "misapprehended the nature of the proceedings pending in the Sheriff Court at the time" of the removal, and that on a proper understanding of these proceedings the Sheriff Court did not have "rights of custody" within the meaning of the Convention. Pet. App. 25a. The court of appeals distinguished the decision of the House of Lords in *In re H (a Minor) (Abduction: Rights of Custody)*, [2000] 2 W.L.R. 337, 2 All E.R. 1, 1999 WL 1319095, on the ground that Ms. Fawcett was not seeking a residence order at the time of Travis's removal. Because the order Ms. Fawcett was seeking "would not have conferred any greater 'rights of custody' on Ms. Fawcett than Section 2(3) of the Children (Scotland) Act, or [a] *ne exeat* clause[ ]," the court of appeals held that the Sheriff Court was not exercising any rights of custody over Travis at the time of his removal from Scotland. Pet. App. 26a-27a.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THE COURT OF APPEALS' INTERPRETATION OF "RIGHTS OF CUSTODY" CONFLICTS WITH THE INTERPRETATION OF OTHER SIGNATORIES TO THE CONVENTION

A treaty is "an agreement among sovereign powers"; accordingly, U.S. courts consider the "understanding of the contracting parties" in deciding questions of treaty interpretation. *Zicherman v. Korean Air Lines Co., Ltd.*, 516 U.S. 217, 226 (1996). In particular, judicial opinions of "sister signatories" interpreting the treaty are "entitled to considerable weight." *Air France v. Saks*, 470 U.S. 392, 404 (1985). This principle applies with special force to the Convention, because Congress has expressly recognized both "the international character of the Convention" and "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3).

In view of these interpretive principles, it is remarkable that the court of appeals in this case failed to discuss – or even to acknowledge – that its interpretation of the phrase "rights of custody" in the Convention conflicts with judicial decisions of numerous other signatory countries, including Australia, Austria, Canada, England, France, Germany, Hungary, Ireland, Israel, New Zealand, Scotland, and South Africa. Courts in each of these countries hold, contrary to the decision of the court of appeals in this case, that a provision prohibiting removal of a child from its country of habitual residence without the permission of a parent or court (*i.e.*, a *ne exeat* provision) gives rise to "rights of custody" within the meaning of the Convention.[14]

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[14] Summaries of most of the following cases are included in the International Child Abduction Database ("INCADAT"), *available at* http://www.incadat.com: **Australia**: *Director-General Dep't of Families, Youth and Cmty. Care and Hobbs*, 24 September 1999, Family Court of Australia (Brisbane) [INCADAT cite: HC/E/AU 294]; *State Central Authority v. Ayob* [1997] 21 Fam. L.R. 567 [INCADAT cite: HC/E/AU 232]; *In the Marriage of R. v. R.*, 22 May 1991, Full Court of the Family Court of Australia (Perth) [INCADAT cite: HC/E/AU 257]. **Austria**: 2 Ob 596/91, Oberster Gerichtshof (Supreme Court) [INCADAT cite: (...continued)

There is thus no basis for the Second Circuit's statement in *Croll v. Croll* (on which the Fourth Circuit relied in this case) that "the cases worldwide are few, scattered, [and] conflicting." 229 F.3d at 133. More accurate is the statement of the South African Constitutional Court that the decision in *Croll* (and, therefore, the decision in this case) is "contrary to the weight of authority."

HC/E/AT 375]. **Canada**: *Thomson v. Thomson*, [1994] 3 S.C.R. 551 [INCADAT cite: HC/E/CA 11]; *Thorne v. Dryden-Hall*, [1997] 148 D.L.R. (4th) 508 [INCADAT cite: HC/E/CA 12]. **England**: *C. v. C.*, 2 All E.R. 465 (Eng. C.A. 1988) [INCADAT cite: HC/E/UKe 34]; *B. v. B.*, 2 All E.R. 144 (Eng. C.A. 1992) [INCADAT cite: HC/E/UKe 10]; *C. v. C.*, 1 FLR 163 (Fam. 1991) [INCADAT cite: HC/E/UKe 35]. **France**: CA Provence, *Ministere Public v. M.B.*, Mar. 23, 1989, 79 Rev. crit. 1990, M. Sainte, pres. [INCADAT cite: HC/E/FR 62 (summary)]. **Germany**: 2 BvR 1126/97, Bundesverfassungsgericht (Federal Constitutional Court of Germany), 18 July 1997 [INCADAT cite: HC/E/DE 338 (summary)]; 10 UF 753/01, Oberlandesgericht Dresden (High Regional Court), 21 Jan. 2002 [INCADAT cite: HC/E/DE 486 (summary)]. *See also Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997) (quoting a German court's opinion that "even one who has only the right to object to the taking of the child to a foreign country has custody rights as per Article 3 and 5 of the Hague [C]onvention"). **Hungary**: *Mezei v. Biro*, 16 June 1998, Capital Court as Appellate Court [INCADAT cite: HC/E/HU 329 (summary)]. **Ireland**: *M.S.H. v. L.H.* [2000] 3 I.R. 390 (Ir. S.C.) [INCADAT cite: HC/E/IE 319]; *H.I. v. M.G.* [2000] 1 I.R. 110 (Ir. S.C.) [INCADAT cite: HC/E/IE 284]. **Israel**: C.A. 5271/92, *Foxman v. Foxman* (H.C. 1992); C.A. 1648/92, *Tourna v. Meshulem* (H.C. 1992). *Foxman* and *Tourna* are discussed in the opinions in *Croll v. Croll*, 229 F.3d at 142 (majority opinion), 151 (Sotomayor, J., dissenting). **New Zealand**: *Re S.* [1997] 1 F.L.R. 486 (H.C.); *Dellabarca v. Christie* [1999] N.Z.F.L.R. 97, 1998 NZFLR LEXIS 79 [INCADAT cite: HC/E/NZ 295]. **Scotland**: *Bordera v. Bordera* [1995] S.L.T. 1176 (Outer House of the Court of Sessions) [INCADAT cite: HC/E/Uks 183]. *See also Pirrie v. Sawacki* [1997] S.L.T. 1160, 1997 SCLR 59, 67 (Outer House of the Court of Sessions) [INCADAT cite: HC/E/Uks 188] (holding, prior to the effective date of the Children (Scotland) Act 1995 that a non-custodial parent whose children had been unilaterally removed from Scotland to the United States had no "rights of custody" for purposes of the Convention, but noting that "[t]he problem for the petitioner in the present case will be met by [section] 3 of the Children (Scotland) Act"). **South Africa**: *Sonderup v. Tondelli*, 2000 (1) SA 1171 (CC) (Constitutional Court of South Africa) [INCADAT cite: HC/E/SA 309].

Sonderup, (1) SA at 1182.[15] The court of appeals' decision also conflicts with decisions of other U.S. courts[16] and the views of leading scholars.[17]

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[15] The Second Circuit identified only three countries (Australia, Israel, and the U.K.) as holding that *ne exeat* provisions create "rights of custody" under the Convention, and two countries (Canada and France) as taking the opposite view. The French decision cited in *Croll* was subsequently disapproved by a higher court. *See supra* note 14. Moreover, the Canadian Supreme Court held in *Thomson v. Thomson*, [1994] 3 S.C.R. 551, that an interim *ne exeat* order issued by a Scottish court vested that court with rights of custody for purposes of the Convention, and ordered the return of the child. Although the Court suggested in *dicta* that a permanent *ne exeat* order might not give rise to "rights of custody," a subsequent decision of a Canadian appellate court holds that a permanent *ne exeat* provision, like an interim provision, gives rise to "rights of custody" under the Convention. *See Thorne v. Dryden-Hall* [1997] 148 D.L.R. (4th) 508. Finally, *D.S. v. V.W.* [1996] 134 D.L.R. (4th) 481, held only that an *implicit* restriction on movement did not confer rights of custody. Although one Justice suggested that an explicit non-removal clause is insufficient to confer "rights of custody," a majority of the Justices expressed reservations about that proposition. *Id.* at 483-84. *See also* Martha Bailey, *"Rights of Custody" Under the Hague Convention*, 11 BYU J. Pub. L. 33, 42-50 (1997) (analyzing Canadian decisions).

[16] *See Janakakis-Kostun v. Janakakis*, 6 S.W. 3d 843 (Ky. Ct. App. 1999), *cert. denied*, 531 U.S. 811 (2000); *David S. v. Zamira S.*, 574 N.Y.S.2d 429 (N.Y. Fam. Ct. 1991) (cited with approval in *Friedrich v. Friedrich*, 78 F.3d 1060, 1065 n.4 (6th Cir. 1996)). *Cf. Shealy v. Shealy*, 295 F.3d 1117 (10th Cir. 2002) (removal justified by an exception to a *ne exeat* provision for military necessity).

The decision in this case is also in considerable tension with the First Circuit's decision in *Whallon v. Lynn*, 230 F.3d 450 (1st Cir. 2000), which holds that the civil law doctrine of "*patria potestas*" confers "rights of custody" within the meaning of the Convention even though it does not involve physical custody of the child. *Patria potestas* involves responsibility for the "physical, mental, moral and social protection of the minor child," including "the obligation for [the child's] guardianship and education," and "the obligation to comport [oneself] in a manner that sets a good example for the children and shall teach them appropriate standards of social interaction." *Id.* at 457.

[17] *See* Paul R. Beaumont & Peter E. McEleavy, *The Hague Convention on the Civil Aspects of International Child Abduction* 72-73, 75-82 (1999) ("[T]he underlying principle should be that a veto over the removal of a child from its habitual residence should ordinarily amount to a right of custody, and its breach should be sufficient to successfully base a return petition."); A. Bucher, *La*

(...continued)

In the leading English case of *C. v. C.*, Lord Donaldson, the Master of the Rolls, explained the reason that *ne exeat* provisions give rise to "rights of custody" within the meaning of the Convention:

> "Custody," as a matter of non-technical English, means "safe keeping, protection; charge, care, guardianship"; but "rights of custody" as defined in the Convention includes a much more precise meaning which will, I apprehend, usually be decisive of most applications under the Convention. This is "the right to determine the child's place of residence." This right may be in the court, the mother, the father, some caretaking institution, such as a local authority, or it may, as in this case, be a divided right – in so far as the child is to reside in Australia, the right being that of the mother; but, in so far as any question arises as to the child residing outside Australia, it being a joint right, subject always to the overriding rights of the court. If anyone, be it an individual or the court or other institution or a body, has a right to object, and either is not consulted or refuses consent, the removal will be wrongful within the meaning of the Convention.

2 All E.R. 465, 473 (Eng. C.A. 1988).[18]

As noted above, in reaching a contrary decision in this case, the Fourth Circuit relied on the decisions of the Second and Ninth Circuits in *Croll v. Croll*, 229 F.3d 133 and *Gonzalez v.*

Famille en droit international prive 283 Recueil des cours 9, 169 n.391 (2000); John M. Eekelaar, *International Child Abduction by Parents*, 32 U. Toronto L.J. 281, 309 (1982); Linda Silberman, *supra* note 11; *but see* A.E. Anton, *The Hague Convention on International Child Abduction*, 30 Int'l Comp. L.Q. 537, 546 (1981).

[18] The Second Circuit in *Croll* sought to distinguish *C. v. C.* on the ground that the order at issue expressly granted "joint guardianship" to both parents, *see* 229 F.3d at 143, but this was clearly not the basis for the decision.

Gutierrez, 311 F.3d 942. Indeed, the Fourth Circuit said little more than that "[w]e find the reasoning of those courts persuasive." Pet. App. 25a. In fact, reasoning of those courts is unsatisfactory.

The Second Circuit "open[ed] the dictionary to find the ordinary meaning or meanings of custody." 229 F.3d at 138. Although recourse to dictionaries is appropriate and useful in many cases, the Second Circuit's approach in this case was flawed in two respects. *First*, the Second Circuit failed to accord due weight to the plain language of Article 5 of the Convention, which defines "rights of custody" as "rights relating to the care of the person of the child and, *in particular, the right to determine the child's place of residence*." (Emphasis added). The Second Circuit dismissed the highlighted language as merely "indicative," and "an apt example of a right of custody." 229 F.3d at 139. But this is contrary to the text of the Convention, which singles out the right to determine the child's place of residence "in particular." Moreover, the Second Circuit observed that a *ne exeat* provision does not give a parent a unilateral right to "determine" the child's place of residence. But, again, this observation is contrary to the text of the Convention, which specifically provides (in Article 3) that rights of custody may be exercised "either jointly or alone."

Second, the Second Circuit relied exclusively on American dictionaries, even though the Convention in Article 3 specifically refers to "rights of custody . . . under the law of the State in which the child was habitually resident" and the U.S. implementing legislation recognizes both the "the international character of the Convention" and "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3). Indeed, as explained below, in this case the Fourth Circuit's understanding of "rights of custody," based solely on American sources, resulted in a serious misunderstanding of Scots family law. *See infra* at 15-19.

In addition to departing from the language of the Convention, the Second Circuit in *Croll* – and the Fourth Circuit in this case – overlooked many of the materials described above that shed light on the intentions of the drafters, including discussions of

this specific issue both before and after the final language of the Convention was adopted.

In sum, the decisions of numerous courts holding that *ne exeat* provisions confer "rights of custody" under the Convention are persuasive. The conflicting decision of the court of appeals should be reviewed by this Court and reversed.

II. THE COURT OF APPEALS MISUNDERSTOOD SCOTS LAW AND FAILED TO ACCORD APPROPRIATE WEIGHT TO THE DECISION OF THE SCOTTISH COURT

As noted above, Article 3 of the Convention refers to rights of custody "under the law of the State in which the child was habitually resident immediately before the removal," while Article 5 provides that, for purposes of the Convention, "rights of custody . . shall include . . . in particular, the right to determine the child's place of residence." In this case, the court of appeals not only misinterpreted the phrase "rights of custody" as defined by Article 5 of the Convention, it also misapplied the law of Scotland and failed to accord appropriate weight to the decision of the Sheriff Court. As the First Circuit has recognized, "care must be taken to avoid imposing American legal concepts onto another culture." *Whallon*, 230 F.3d at 456. On a proper understanding of Scots law, both Ms. Fawcett and the Ayr Sheriff Court have "rights of custody" for purposes of the Convention.

A. Ms. Fawcett Has Rights Of Custody Within The Meaning Of The Convention

The Sheriff Court issued an order holding that Mr. McRoberts's removal of Travis from Scotland "without the express permission of [Ms. Fawcett] was in Contravention of her parental rights in terms of Sections 2(3) and 2(6) of the Children Scotland Act of 1995," and "in breach of a specific undertaking given and recorded in the Interlocutor of 15 February 2001 not to do so pending determination of the present proceedings." Pet. App. 33a. Despite this order, the Fourth Circuit held that the decree of divorce issued by the Sheriff Court "modified the parental rights that Ms. Fawcett would have otherwise had under § 2 of the Children (Scotland) Act" by "giv[ing] Mr. McRoberts

the exclusive power to determine Travis's residence, thereby necessarily depriving Ms. Fawcett of that same right." Pet. App. 22a. The court of appeals did not attempt to reconcile its decision with the contrary order of a Scottish court – indeed, the very Scottish court that issued the decree of divorce. The court of appeals' decision thus fails to give effect to Sections 2(3) and 2(6) of the Children (Scotland) Act 1995, which "make clear that removal by one parent with parental responsibilities and parental rights without the consent of the other parent with parental responsibilities and parental rights amounts to 'wrongful removal' for the purposes of the Hague Convention." Norrie, *supra*, at 12.

The court of appeals also erred in holding that Ms. Fawcett had no other rights under Scots law that amount to "rights of custody" under the Convention. As noted above, "[t]he expression 'rights of custody' and its traditional corollary, 'rights of access' have fallen out of use in contemporary family law. In England and Scotland the Children Acts of 1989 and 1995 have replaced such terms with the ideas of parental rights and responsibilities." Beaumont & McEleavy, *supra* note 17, at 74. In Scotland, "[t]here is now increased recognition of the role to be played by both parents in the life of a child following the break-up of a marriage or relationship. Consequently, even if one parent assumes the role of primary carer it is now more likely that the other will be allowed greater involvement than mere periodic visitation, whether through a judicially appointed order or a statutory right." *Id.* at 75.

Even prior to the enactment of the Children Acts of 1989 and 1995, "a right of custody proceeded beyond mere physical possession; rather it incorporated a 'bundle of rights' with respect to the care of the minor which may be vested in a number of persons, or shared between an individual and an institution." *Id.* at 76 n.193 (citation omitted).[19] Under both English and Scots law "a

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[19] "In common law, the term 'custody' does not simply mean the actual possession of the child (this is often referred to as 'care and control') but refers to a bundle of 'rights' respecting the child. These will include the day to day care of the child, but can also comprehend the rights to determine the child's religion, education and place of residence." John Eekelaar, *The Hague Convention on the Civil Aspects of International Child Abduction: Explanatory Documentation* (...continued)

parent who enjoyed rights of access alone may also have been attributed rights to determine the child's education, medical treatment, or most importantly in this context, his or her place of residence." *Id.* (citations omitted).

These principles were confirmed and extended by the Children (Scotland) Act 1995. As noted above (at pages 4-6), the Act provides that a parent shall have the right "to control, direct or guide, in a manner appropriate to the stage of development of the child, the child's upbringing," "to maintain personal relations and direct contact with the child on a regular basis," "to safeguard and promote the child's health, development and welfare," and "to provide, in a manner appropriate to the stage of development of the child . . . direction . . . [and] guidance to the child," as well as the right to regulate the child's residence.[20]

The Fourth Circuit observed that the parental rights and responsibilities recognized by the Children (Scotland) Act 1995 may be modified or terminated by a court order pursuant to Section 11 of the Act. The court of appeals failed to note, however, that a court order shall have the effect of depriving a person of a parental right or responsibility "only in so far as the order expressly so provides and only to the extent necessary to

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Prepared for Commonwealth Jurisdictions 15-17 (Commonwealth Secretariat 1981).

[20] In support of its conclusion that "rights of custody" means a residence order under Scots law, the court of appeals relied on commentary to the opinion of the Scottish Court of Session in *Donofrio v. Burrell*, 2000 S.C.L.R. 465 (1999). The court of appeals' reliance on this commentary (which has no weight as legal precedent) was unwarranted in view of the considerations set out above. *Donofrio v. Burrell* involved a removal from Canada to Scotland, and thus the relevant national law was Canadian. In addition, the father did not seek the return of the child to Canada, but instead sought only access to the child in Scotland. The issue before the court was whether the father had followed the proper procedures to make such an application. The court observed in passing that "return was not, and is not, insisted in" because the removal was "not in breach of rights of custody." This was an unremarkable statement, in view of the fact that there is no mention of a *ne exeat* provision or any other basis for asserting "rights of custody" under the Canadian law.

give effect to the order," Act § 11(11), and that the orders of the Sheriff court in this case did not expressly deprive Ms. Fawcett of her rights and responsibilities to provide direction and guidance to Travis and to safeguard and promote his health, development, and welfare. Accordingly, Ms. Fawcett's rights and responsibilities under Scots law are sufficient to confer "rights of custody" within the meaning of the Convention.

B. The Sheriff Court Has Rights Of Custody Within The Meaning Of The Convention

The court of appeals also held that the Sheriff Court lacks "rights of custody" within the meaning of the Convention. The court recognized that its ruling on this issue potentially placed it in conflict with the decision of the House of Lords in *In re H*, 1999 WL 1319095, which holds that courts may have "rights of custody" within the meaning of the Convention and that a parent may assert those rights in a petition for return of the child. Pet. App. 26a (citing *In re H*). The court of appeals accepted the decision in *In re H* but sought to distinguish it on the ground that "the application pending in the Sheriff Court *at the time* Mr. McRoberts left Scotland with Travis" did not "raise matters of custody within the meaning of the Convention," because Ms. Fawcett had not applied for a residence order. Pet. App. 26a. This is incorrect, for several reasons.

First, as explained above and in the request for return filed by the Scottish Executive Justice Department, Ms. Fawcett "raised court proceedings [in the Ayr Sheriff Court] with a view to varying the residence order in her favour." C.A. App. 19; *see also id.* at 23 (civil proceeding in progress at the time of the removal consisted of an "action seeking residence of child at Ayr Sheriff Court").

Second, even if Ms. Fawcett had not been seeking a residence order, for the reasons explained above (at pages 10-15), a *ne exeat* provision gives rise to "rights of custody" within the meaning of the Convention. It is undisputed that the undertaking given by Mr. McRoberts not to remove Travis from Scotland without permission was "an agreement having legal effect under the law of that State," Convention Art. 3, and that the matter remained pending before the Sheriff Court at the time of the removal.

Third, as explained above (at page 16-17), even apart from her application for a residence order and her *ne exeat* rights, Ms. Fawcett had a bundle of parental rights and responsibilities with respect to Travis sufficient to give rise to "rights of custody" under the Convention. In applying for an interdict to prevent Travis's removal to the United States, Ms. Fawcett sought to protect her ability to exercise these rights and responsibilities, as well as her shared right to determine whether Travis should live outside Scotland. For this reason, as well, her application raised "rights of custody" for purposes of the Convention.

III. THE DECISION OF THE COURT OF APPEALS UNDERMINES THE NEED FOR UNIFORM INTERNATIONAL INTERPRETATION OF THE CONVENTION

This Court will grant a petition for a writ of certiorari when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10. This case presents an important question concerning the proper interpretation of an important treaty, which, by virtue of the Supremacy Clause, is "the supreme law of the land." U.S. Const. art. VI, § 2. Congress has specifically recognized "the need for uniform international interpretation of the Convention." 42 U.S.C. § 11601(b)(3). The court of appeals in this case has interpreted the Convention in a way that conflicts with judicial decisions of other signatories to the Convention. Congress's recognition of the need for uniform international interpretation, as well as considerations of international comity, indicate that if the United States is to disagree with its fellow contracting parties on a vital question concerning the meaning and scope of the Convention, that question should be considered and decided by this Court.

The need for uniform international interpretation also counsels against delaying review by this Court. So long as the decisions of the courts of appeals remain in effect, the goal of uniform international interpretation is frustrated throughout large areas of the United States. Although the issue is certain to arise in future cases, and a conflict in the circuits may arise at some point, the issue has now been considered by multiple U.S. and non-U.S.

courts, and there is no reason to believe that this Court would benefit from allowing the lower courts additional time to consider the issue.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to invite the Solicitor General to submit a brief setting forth the views of the United States on the question presented. *See Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185-85 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.").

Respectfully submitted,

Robert A. Long
Counsel of Record
COVINGTON & BURLING
1201 Pennsylvania Ave., NW
Washington, DC 20004-2401
(202) 662-6000

Counsel for the Scottish Ministers

September 19, 2003